NO. 87-5781

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

GREGORY SCOTT ENGLE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

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The opinion of the Supreme Court of Florida, Engle v. State, 510 So.2d 881 (Fla. 1987) is set forth in Appendix A. The motion for rehearing and denial thereof are set forth in Appendix B and C.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered on June 25, 1987, and petitioner's timely motion for rehearing was denied on September 3, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1973), and involves the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner, GREGORY SCOTT ENGLE, along with Rufus Stevens, was charged by indictment returned April 5, 1979 with first degree murder of Eleanor Kathy Tolin. On petitioner's motion, his trial was severed from that of Stevens.

Petitioner's trial took place on May 29 - June 2, 1979, before Circuit Judge John E. Santora and a jury.[1/] The state's key witness was Nathan Hamilton, a cousin (by marriage) of Rufus Stevens. Hamilton testified that on the night of March 12, 1979, beginning at around 8:00 p.m., he and Stevens were drinking together. They hit about five different bars

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1/ Petitioner's brief on direct appeal, Appendix E (P.7-16), contains a more detailed statement of the evidence presented at trial.

around Jacksonville. At about 10:00 p.m (approximately four hours before petitioner came into the picture), Stevens started discussing a robbery. He asked Hamilton if he wanted to come with him and rob the Best Western Motel in Orange Park. Hamilton told Stevens to let him think about it for a while, it was "a little out of his league." After first broaching the subject, Stevens continued to talk about robbing the Best Western. Hamilton figured the drunker Stevens got, he'd forget about it.

Shortly before 12:30 a.m., Stevens and Hamilton stopped at the Majik Market on the corner of Catoma and Timuquana for a cup of coffee. Kay Tolin was working there at the time. As they got back in the car and were leaving, Stevens said to Hamilton that they had just left the best place to rob. Hamilton replied that he thought Stevens was crazy because the lady could identify both of them; they both lived in that neighborhood and everybody around there could identify them. Rufus Stevens said they would take her out of the store, to get her away from the phone.

Nathan Hamilton testified that it was his understanding that, if he had agreed to do it, the robbery of the Majik Market was to occur immediately. According to Hamilton, Rufus Stevens was ready, willing, and able to commit the robbery right then, if he [Hamilton] had acquiesced to the plan. This was true even though, as far as Hamilton knew, Stevens did not have a weapon.

About an hour to an hour and a half later, Stevens and Hamilton picked up petitioner, who got into the back seat of the car. Rufus Stevens asked petitioner if he wanted to make some money. Petitioner said sure, what do I have to do. Stevens said rob a Majik Market, and petitioner again said sure. There was no more conversation after that. Hamilton remained in the car for about two more minutes, before they dropped him off at his trailer.

Nathan Hamilton also gave testimony regarding conversations, subsequent to the murder, between himself and Rufus Stevens, and between himself and petitioner. On March 13, 1979, as Hamilton was watching television with Stevens, they saw a newscast concerning the robbery at the Majik Market. Stevens said "That's the robbery that my wife thinks that I did." Hamilton knew he had done it. On March 17, Stevens told Hamilton that "we got to get rid of Scott's [petitioner's] knife because that's what it was done with." The next evening, according to Stevens' directions, Hamilton tried to get the knife from petitioner. Hamilton told petitioner that Stevens had said that it was done with his knife. Petitioner tossed the knife to Hamilton and asked him if he saw any blood on it. Hamilton looked at it closely, did not see anything on it, and handed it back to petitioner. Hamilton then tried to trade knives with petitioner, but petitioner wouldn't trade. [Hamilton testified that if he had gotten petitioner's knife, he would have given it to Rufus Stevens]. During this conversation, Hamilton asked petitioner if he thought it was worth a lousy fifty or sixty dollar robbery to take a girl out of a store and kill her, and petitioner answered no, he didn't. Hamilton asked him why they did it. Petitioner said they got her out of the store, away from a telephone, and Rufus Stevens went crazy and started saying she's going to identify us, she's going to identify us.

Nathan Hamilton testified that he did not at any time go to the police voluntarily with what he knew. He explained this by saying "Sir, in the county where I was raised, I was taught all my life that you don't turn in a relative for no reason". Hamilton stated that his relative is Rufus Stevens.

Hamilton first came in contact with the police on Monday a week after the crimes. He had been riding around in a car, and drinking, with a friend Lanny Israel. Hamilton had

told Israel that he knew who had done the robbery and murder, but had not told him who it was. When they were stopped for DWI, Israel (who was driving) told the police that Hamilton knew something about the case, and "the next thing I knew, I was at homicide". At the police station, Hamilton was advised of his constitutional rights by Detective Parmenter. Although he had been told he was not a suspect, Hamilton was concerned about going to jail, because "... when I go to a police station, I usually go to jail, yes".

Hamilton initially told the police what he knew about the crime by referring to the perpetrators as "A" and "B". [Hamilton claimed not to be afraid of anyone, but he was concerned for his wife and baby, and did not want to name names until the police secured them]. "A" referred to petitioner, and "B" referred to Stevens. Hamilton drew a diagram, with the words "easy", "easy", and "weapon" written next to "A" (petitioner) and with the words "hard", "killing", and "car" written next to "B" (Stevens). Hamilton explained that he thought petitioner would be easy to "break", or to get to talk, while Stevens would be more difficult. The reference to "killing" was because Hamilton thought Rufus Stevens might have done the killing. 2/ From knowing them and having lived with them, Hamilton considered Stevens to be the tougher and more dominant one of the two.

After his wife and child were placed in a motel, Hamilton told police the names of "A" and "B", and petitioner and Stevens were arrested.

The medical examiner, Dr. Floro, testified that he could not tell whether the injuries to the victim (ligature strangulation, multiple stab wounds to the back, and a laceration in the vaginal area which could have been caused by a large object or by forcible intercourse) were inflicted by one person or more than one person.

2/ Detective J.L. Parmenter (who, like Hamilton, was a state witness) testified at trial that Hamilton told him that "B" (Stevens) had killed the woman. Parmenter also testified that he already knew the first name Scott and Rufus, from Lanny Israel. According to the pre-sentence investigation report (which was before the trial judge at the time of sentencing), after the police had secured Hamilton's wife and child, Hamilton gave Detective Parmenter the names of the suspects: "Nathaniel [Nathan] Hamilton stated that the suspects' names were Scott Engle and Rufus Stevens and that Rufus Stevens was a first cousin to his wife and that Rufus Stevens had done the killing with Scott's knife."

Two hours into its guilt phase deliberations the jury returned with three questions, phrased as follows:

> No. 1 - Testimony of Nathan - We would like to see his testimony in which he said to the effect: "I know he (or they) killed her."
>
> No. 2 - In order to prove first degree murder, must we be convinced that the defendant killed the victim?
>
> No. 3 - We do not now need Nathan's testimony. We do need the judge's definition previously requested.

The trial court reinstructed the jury on the degrees of murder and on principals. He asked the foreman of the jury whether that answered their question; the foreman replied "Can we confer on it, Your Honor?" Five minutes later, the jury buzzed again. The trial court said to counsel:

> Apparently, we didn't -- I didn't answer their question because this question reads: Do we have to be convinced the defendant personally killed the victim to render a [verdict] of murder in the first degree? This is the same question they asked before.

The trial court again referred the jury to the written instructions which they had in the jury room.

At 8:51 p.m., the jury buzzed again and informed the trial court that they were not close to a verdict, and needed to get something to eat. With the assent of counsel, the trial court permitted the jury to recess for the night. At 8:30 the following morning, the jury reconvened. After an hour, the jury asked to be provided with an easel and chalk, and this was done. Finally, at 10:58 a.m., after nearly six hours of deliberations, the jury returned a verdict finding appellant guilty as charged of first degree murder.

The penalty phase of the trial commenced within minutes after the guilty verdict was announced. No additional evidence was presented by either the state or the defense. Rather, the cause was submitted based upon the arguments of counsel and the instructions of the court. The jury was specifically instructed

that it was to base its penalty verdict "upon the evidence which you have heard while trying the guilt or innocence of the defendant, and evidence which has been presented to you in the proceedings".

In his summation to the jury, the prosecutor sought to arouse the jury's emotions and their natural sympathy for the victim and her family [3/], and to denigrate the mitigating circumstances of petitioner's lesser culpability as compared with Rufus Stevens; and petitioner's role as a follower while Stevens was the planner and leader:

> Let me make it perfectly clear before we get into all of this: mitigating and aggravating circumstances that we're talking about, that little fine young lady, five feet tall, 115 pounds, 24 years old with a husband and children, working at night at probably minimum wages, with two sons and I want you, you have the right now to think about that Kay Tolin, you have a right to think about it.
>
> We're in a different phase, you have a right to think about that little lady, that is, before the murderer, that is, before he got in the death car. I want you to remember, ladies and gentlemen, I want you to remember that Rufus Stevens would not go to that Majik Market unless somebody went with him. The only reason we've got the after picture is because he got in the car and said yes, yes, I will do it. Rufus didn't have the guts to do it by himself. He told it over and over again, let's rob this store. He didn't have the guts to do it by himself but he went out and got Mr. Kool. Mr. Kool said sure. Sure.
>
> That's Kay Tolin afterwards, that's Kay Tolin after. Look at her. That's a human being in Jacksonville, Duval County, Florida, in March of 1979.
>
> Pardon me, Your Honor, I didn't mean to make that noise.
>
> * * * *
>
> You're concerned whether he had to have actually thrust the knife on her. I know you were concerned about that. You asked questions during the trial about it and we lawyers are and the judge is concerned about it. We couldn't answer your questions

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3/ See Booth v. Maryland, ___U.S.___, ___S.Ct.___, 96 L.Ed.2d 440 (1987).

because of the law and I understand the law but we did the best we could and the Judge did the best he could. But if you believe, if you believe that Rufus Stevens killed that girl for the purpose of not being identified, that he formed the intent to kill her for that purpose, that is first degree murder and then if you believe that he gave this knife to Rufus Stevens, you find he is just as guilty as Rufus Stevens.

* * * *

I don't care if Rufus did it, if Rufus Stevens did it, I don't care if he actually put his hand or whatever it was, he was there. You can't any more separate him from that death car for one split second, you can't separate him from that death car that night from 2:00 o'clock in the morning until daylight, you can't separate them from that car, you got to put Kay Tolin in it and you got to put that murderer in it and you got to put Scott Engle in it. He's there, she's there and it all happened there or right around him.

The prosecutor may not have cared if Rufus Stevens did it, but the jury obviously did care. After 25 minutes of deliberation, they returned a recommendation that petitioner be sentenced to life imprisonment.

On August 17, 1979, the trial judge rejected the jury's life recommendation and sentenced petitioner to death. In his unsuccessful effort to persuade the trial judge that there was a reasonable basis for the jury's life recommendation and it should be followed [4/], defense counsel argued that the recommendation was based on the jury's assessment of the comparative culpability of Engle and Stevens. The judge queried:

> Are you under the impression that if two men participate in a crime like this, one of them kills her and the other one sits there and aids and abets, that he is not equally guilty?
>
> MR. SHORSTEIN [Defense counsel]: Your Honor, I'm not arguing with that, I'm not arguing that he's not equally guilty of murder.
>
> THE COURT: That he should not suffer the same fate?
>
> MR. SHORSTEIN: Absolutely, Your Honor, and I have cases to cite to Your Honor that the Supreme Court finds the distinction differentiation.
>
> THE COURT: Well, then, the Supreme Court will just have to make its ruling in this case, too.
>
> MR. SHORSTEIN: Well, Your Honor, I'm just trying to argue what I think the law is to the Court.
>
> THE COURT: Well, I have to listen to you and you have, I must say, done a fantastically great job in coming up with these innovations. They're interesting.

In his order sentencing petitioner to death, the trial judge found four aggravating circumstances, found no mitigating circumstances, and made no reference to the jury's recommendation of life imprisonment. Included in the sentencing order was a recitation of the facts of the crime. Many of those purported facts, however, were not based on any evidence presented in petitioner's trial. Rather, their source was statements made by Rufus Stevens, which had been admitted into evidence at Stevens' trial (in which Judge Sentora had also presided).

On September 15, 1983, the Florida Supreme Court affirmed petitioner's conviction, but reversed the death sentence on the grounds that the trial court improperly considered Rufus Stevens' statements, in violation of petitioner's Sixth Amendment right of confrontation. Engle v. State, 438 So.2d 803, 813-814 (Fla. 1983). The death sentence was vacated and the case remanded to the trial court with instructions that he conduct another sentencing hearing. However, in dicta, the Florida Supreme Court placed its stamp of approval on the judge's refusal to follow the jury's life recommendation. Engle v. State, supra, 438 So.2d at 812.

4/ Under well established Florida law, a trial court may not override a jury's recommendation of life unless "no reasonable person could differ" from the conclusion that death is the appropriate sentence. Tedder v. State, 322 So.2d 906 (Fla. 1975). If there is any reasonable basis (statutory or non-statutory) in mitigation discernible from the record from which the jury could have properly concluded that life was the appropriate sentence, the trial judge is not free to override it. See e.g. Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981); Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982); Cannady v. State, 427 So.2d 723, 731 (Fla. 1983); Barclay v. State, 470 So.2d 691, 695 (Fla. 1985). In Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), in which the constitutionality of Florida's life override provision was upheld, this Court recognized the Tedder standard, and expressed the opinion that the Florida Supreme Court takes that standard seriously. One of the purposes of this petition for certiorari will be to demonstrate that the Florida Supreme Court no longer takes the Tedder standard seriously, or at least that it applies it in an arbitrary and inconsistent manner which is incompatible with the Eighth and Fourteenth Amendments' requirement of heightened reliability and channelled discretion in capital sentencing. See Reasons for Granting the Writ, infra.

The resentencing hearing was held on October 4, 1984. At the outset, Judge Sentora denied petitioner's request that he recuse himself. Petitioner presented additional witnesses -- his mother and sister -- in mitigation [5/]. Petitioner's mother testified that he was sickly and immature as a child. "[I]t seemed as he grew older his playmates that he chose were younger than him"; yet, although he was older than the other kids, he was always a follower, rather than a leader. The mother and sister also testified concerning petitioner's father, who had suffered from severe physical and mental problems ever since World War II, and was abusive to the children. According to the psychiatric report prepared by Dr. Yates:

> The elder Mr. Engle is described as a disabled war veteran with a leg amputation. He is asserted to have been alcoholic, with psychiatric problems, and who frequently beat his son. Mr. Engle [petitioner] asserts that he could never measure up to his father's expectations of him, and that his father has lowered an automobile hood upon his neck, and beat him while asleep with canes, bricks, and scalding coffee. The elder Mr. Engle was deceased December 31, 1969, and according to [petitioner], "I don't celebrate Christmas because of it." His mother is described as "nice" because she did not beat her son ....

At the conclusion of the resentencing hearing, the trial judge deferred imposition of sentence. On March 28, 1986, the judge again sentenced petitioner to death. In his sentencing order [Appendix D], he found four aggravating circumstances, no mitigating circumstances, and again made no reference to the jury's life recommendation.

On June 25, 1987, the Florida Supreme Court affirmed appellant's death sentence, saying:

> The closer issue is whether it can be said that there existed a reasonable basis for the jury's recommendation of

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5/ The testimony presented at the resentencing hearing is set forth in more detail in petitioner's initial brief on direct appeal. [Appendix E, p.17-22] Also before the trial court were psychiatric evaluations by Dr. Ernest Miller and Dr. Lauren Yates (as part of the original pre-sentence investigation report), and by Dr. James Vallely (introduced by petitioner in the resentencing hearing).

> life. If so, that recommendation must be given effect. Tedder v. State, 322 So.2d 908 (Fla. 1975). Appellant does not seriously argue that what was done to Tolin does not warrant imposition of the death penalty. In essence, he contends that the jury recommendation was plausible because there was no direct evidence that appellant, rather than Stevens, actually did the killing. Appellant points out that it was Stevens' idea to rob the Majik Market and refers to his own statement to police that Stevens had gone crazy. Appellant also suggests that the jury could have concluded that Stevens was the more dominant of the two because Hamilton thought appellant would be more likely to confess. [6/]

Engle v. State, 510 So.2d 881, 883-884 (Fla. 1987)

6/ The Florida Supreme Court, among other things, did not fairly state petitioner's contentions on appeal as to the evidence in the record which supported the jury's life recommendation. The record establishes much more than that it was Stevens' idea to rob the Majik Market. It also establishes, by the testimony of the state's own key witness, that Rufus Stevens knew that Mrs. Tolin could identify him and for that reason he intended to abduct her from the store; that this plan was formulated by Stevens at least an hour before petitioner ever came into the picture; and that when Stevens was recruiting petitioner to assist him (while Hamilton was still in the car), he told petitioner that they would rob a Majik Market, but did not mention anything to him about abducting the clerk. Petitioner's subsequent statement to Hamilton in which he said Rufus went crazy and started saying she's going to identify us, she's going to identify us is consistent with Hamilton's testimony regarding Rufus Stevens' concerns in planning the crime. Similarly, the record establishes much more than that "the jury could have concluded that Stevens was the more dominant of the two because Hamilton thought [petitioner] would be more likely to confess." That observation was derived from Hamilton's statements to Detective Parmenter (in which, more significantly, Hamilton told Parmenter that Stevens had done the killing). But, apart from that, Nathan Hamilton also testified before the jury that from knowing both Stevens and petitioner for a number of years and from having lived with both of them, he considered Stevens to be the tougher and more dominant one of the two. Finally, not only was there "no direct evidence that [petitioner] rather than Stevens, did the killing', there was evidence, presented by prosecution witnesses (Hamilton and Parmenter) from which the jury could have affirmatively concluded that Rufus Stevens was the dominant participant in the robbery and abduction, and perhaps even the sole participant in the actual murder. The jury's belief that petitioner's role was essentially that of an aider and abetter is reflected in their questions during their guilt phase deliberations; in the prosecutor's emotional penalty phase argument ("I don't care if Rufus did it, if Rufus Stevens did it"); and in the trial judge's August 17, 1979 colloquy with defense counsel (expressing the view that an aider and abetter is equally guilty as the actual killer, and should necessarily suffer the same fate). All of the above facts and circumstances were argued emphatically in petitioner's briefs on direct appeal [Appendix E, p.2,9-13,16-17,22,27-29,32-33, 35-37, Appendix G, p. 6].

The Florida Supreme Court continued:

> Upon consideration, we conclude that the trial judge properly overrode the jury recommendation. There is ample support in the record for each of the aggravating circumstances. Appellant admitted his participation in the abduction. He acknowledged that he was with Stevens during the entire span of time within which Tolin was murdered. The evidence supports the conclusion that it was appellant's knife which caused the fatal stab wounds and that appellant returned home with some of the money from the Majik Market robbery. It would be unreasonable under these circumstances to conclude that appellant played no part in the brutal slaying. Hence, there was not a reasonable basis for the jury's recommendation of life imprisonment.

Engle v. State, supra 510 So.2d at 884

On motion for rehearing [Appendix B], petitioner contended, inter alia, that in placing the burden on petitioner to prove that he "played no part" in the killing, the Florida Supreme Court had misapplied the Tedder standard, denigrated a number of statutory and non-statutory mitigating circumstances, and ignored the established precedent of Barclay v. State, 470 So.2d 691 (Fla. 1985) and Hawkins v. State, 436 So.2d 44 (Fla. 1983). On September 3, 1987, the motion for rehearing was denied [Appendix C].

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his initial brief on direct appeal, petitioner contended that the jury's life recommendation was based on valid mitigating circumstances (petitioner's lesser culpability as compared with Stevens, and his role as follower in contrast to Stevens' dominant role as planner and leader); and therefore the trial judge, in overriding the life recommendation, violated the Tedder principle [Appendix E, p.24-42; Appendix G, p.1-7]. Petitioner argued:

> In Spaziano v. Florida, 468 U.S. ___, 82 L.Ed.2d 340, 356 (1984), in which the U.S. Supreme Court upheld the constitutionality of the "override" provision of Florida's death penalty law, it stated, "This Court already has recognized the significant safeguard the Tedder standard affords a capital defendant in Florida [citations omitted]. We are satisfied that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role."

> Several months after Spaziano was decided, this Court stated that "In the years since [Tedder was decided] we have not wavered from the Tedder test and have consistently applied it to the facts and circumstances of cases on review where the trial judge has overridden a jury recommendation of life imprisonment and imposed the death penalty." Thompson v. State, 456 So.2d 444, 447 (Fla. 1984)....

[Appendix G, p.34-35]

In the brief, petitioner pointed out to the Florida Supreme Court that in two previous decisions - Barclay v. State, 470 So.2d 691 (Fla. 1985) and Hawkins v. State, 436 So.2d 44 (Fla. 1983) - it had already recognized that the jury's assessment of a capital defendant's comparatively lesser culpability, and his role as a follower, are valid considerations in mitigation upon which the jury can reasonably base a life recommendation. [Appendix E, p.30-33,37-38; Appendix G, p.7]

In its opinion, the Florida Supreme Court approved the trial court's rejection of the jury's life recommendation, without any mention of or attempt to distinguish Barclay or Hawkins, on the ground that it would be unreasonable (of the jury) to conclude that petitioner "played no part in the brutal slaying". Engle v. State, supra, 510 So.2d at 884.

In his motion for rehearing, petitioner argued that the Florida Supreme Court, in its opinion, had misapplied the law in such a way as to violate many of the constitutional safeguards required in death penalty cases:

> In placing the burden on appellant to prove that he "played no part" in the killing, this Court misapplied the Tedder standard, denigrated a number of statutory and non-statutory mitigating circumstances, and ignored the established precedent of Barclay v. State, 470 So.2d 691 (Fla. 1985); and Hawkins v. State, 436 So.2d 44 (Fla. 1983). Under these circumstances, this Court's affirmance of appellant's death sentence violates due process, and the Eighth and Fourteenth Amendments of the United States Constitution. See Godfrey v. Georgia, 446 U.S. 420 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Eutzy v. Florida, ___ U.S. ___, 105 S.Ct. 2062 (1985) (Marshall, J., joined by Brennan, J., dissenting from the denial of certiorari).
>
> Until now, this Court has not held that a jury life recommendation is unreasonable

unless the defendant "played no part" in the killing. [To the contrary, in the previous cases, both Barclay and Hawkins played a substantial part in the respective murders, yet this Court held that the jury could reasonably draw a distinction between the leader and the follower, between the more culpable and the less culpable, and that therefore the jury recommendations of life for Barclay and for Hawkins should be given effect. Barclay v. State, supra; Hawkins v. State, supra]. Nor does the validity of a jury life recommendation depend on whether the trial judge found any mitigating circumstances; rather, the Tedder standard requires an inquiry into whether the jury could reasonably have based its recommendation on statutory or non-statutory mitigating factors, in its view of the evidence. See Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981); Cilvin v. State, 418 So.2d 996, 999 (Fla. 1982); Cannady v. State, 427 So.2d 723, 731 (Fla. 1983); Barclay v. State, supra, at 695; Amazon v. State, 487 So.2d 8, 13 (Fla. 1986). Since, in the present case, there was clearly evidence[2 Much of it supplied by the state's star witness Nathan Hamilton] to support the jury's view that Rufus Stevens, not appellant, was the leader, planner, and dominant participant in the abduction and murder, and that it was Stevens, not appellant, who "went crazy" and stabbed the victim to death with appellant's knife, it appears that this Court is holding as a matter of law that, in the absence of a showing that appellant "played no part" in the homicide, his lesser culpability as compared with Stevens, and his role as a follower rather than a leader, are not valid mitigating circumstances [Footnote omitted]. Not only is this conclusion irreconcilable with Barclay and Hawkins, it is also contrary to the constitutional principles recognized in Lockett v. Ohio, supra, and Eddings v. Oklahoma, supra.

[Appendix B, p.1-3]

Petitioner, citing Justice Marshall's dissent from the denial of certiorari in Eutzy v. Florida, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985), concluded his motion for rehearing as follows:

> As in Eutzy, but perhaps to an even greater degree, this Court has once again misunderstood the nature of mitigating circumstances, and consequently, has failed to recognize the reasonable basis for the jury's recommendation of life. As a result, the affirmance of appellant's death sentence violates the basic constitutional principles of Lockett and Eddings. Moreover, in view of the fact that this Court has rejected as

> "unreasonable" in the instant case a life recommendation which was based on exactly the same mitigating considerations which were accepted as "reasonable" in Barclay v. State, supra, and Hawkins v. State, supra, and in view of the fact that this Court has declined to acknowledge, much less adhere to, the existing precedent, appellant submits that this Court has adopted an arbitrary and capricious standard of review in "life override" cases which renders the override provision unconstitutional [Footnote omitted]. See Godfrey v. Georgia, supra.

[Appendix B, p.6-7]

On September 3, 1987, the Florida Supreme Court denied rehearing without opinion [Appendix C].

REASONS FOR GRANTING THE WRIT

QUESTION I

WHETHER THE FLORIDA SUPREME COURT HAS ADOPTED A METHOD OF REVIEW IN "LIFE OVERRIDE" CASES WHICH DENIGRATES LEGITIMATE MITIGATING CIRCUMSTANCES - IN THIS INSTANCE, PETITIONER'S COMPARATIVELY LESSER CULPABILITY AND HIS ROLE AS A FOLLOWER - BY CHARACTERIZING THEM AS "UNREASONABLE" BASES FOR THE JURY TO RECOMMEND LIFE.

This Court has repeatedly stressed the constitutional importance, in capital sentencing, of full and fair consideration of all mitigating circumstances, as long as they are relevant to the character of the individual defendant or the circumstances of the offense. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. ___, 90 L.Ed.2d 1 (1986); Sumner v. Shuman, 483 U.S. ___, 107 S.Ct. ___, 97 L.Ed.2d 56 (1987). See also Eutzy v. Florida, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari). In Sumner v. Shuman, supra, which struck down as violative of the Eighth and Fourteenth Amendments Nevada's mandatory death penalty for murder committed by an inmate serving a life sentence without possibility of parole, this Court emphasized that when a murder is committed by two or more persons, an

individual defendant's comparatively lesser culpability is a valid, relevant mitigating circumstance, and has been long recognized as such.

> The fact that a life-term inmate is convicted of murder does not reflect whether any circumstance existed at the time of the murder that may have lessened his responsibility for his acts even though it could not stand as a legal defense to the murder charge. This Court has recognized time and again that the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime. See, e.g., Tison v. Arizona, 481 US ___, 95 L.Ed.2d 127, 107 S.Ct. 1676 (1987); Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982).

Sumner v. Shuman, supra, 97 L.Ed.2d at 67-68.

In the present case, the Florida Supreme Court determined that it would be unreasonable to conclude that petitioner played no part in the murder, and that finding may indeed be sufficient to overcome petitioner's secondary argument that (regardless of the jury recommendation) the death sentence is invalid strictly on proportionality grounds. Compare Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); Tison v. Arizona, 481 U.S. ___, 107 S.Ct. 1676, 95 L.Ed.2d 1676 (1987). But that was never petitioner's main contention anyway. The jury did not necessarily, or even probably, base its life recommendation on a finding that petitioner played no part in the killing; but rather that he played a significantly lesser part than Rufus Stevens. If comparative culpability is a constitutionally relevant mitigating factor, then, under the Tedder standard, there was clearly a reasonable basis for the jury's life recommendation, and petitioner was entitled by law to be sentenced in accordance with that recommendation. The effect of the Florida Supreme Court's opinion in this case amounts to a de facto holding that a defendant's comparatively lesser culpability, and his role as a follower (where the co-perpetrator, according to the state's own key witness, was the planner of the robbery and abduction; the stronger and more dominant personality; and, according to what the witness told the police, the one who

did the actual killing), are not valid mitigating circumstances in the absence of a showing that the defendant "played no part" in the killing.

To paraphrase Billy Martin, this is an issue about which the Florida Supreme Court feels very strongly both ways. In Barclay v. State, 470 So.2d 691, 695 (Fla. 1985) and Hawkins v. State, 436 So.2d 44, 47 (Fla. 1983), the state Supreme Court held that the jury could properly consider the defendant's comparatively lesser culpability [Hawkins] and his role as a follower [Barclay], and that consequently there was a reasonable basis for these juries' life recommendations. On the other hand, in White v. State, 403 So.2d 331, 339-341 (Fla. 1981) [see State v. White, 470 So.2d 1377 (Fla. 1985)], and in the instant case, jury recommendations based on precisely the same mitigating considerations were rejected as unreasonable. 7/ [See Question II, infra]. Thus, what the Florida Supreme Court has done is to adopt a method of review in "life override" cases which denigrates valid mitigating circumstances in violation of the principles established in Lockett, Eddings, Skipper, and Sumner v. Shuman, and which results in arbitrary and capricious infliction of the death penalty in violation of the principles of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

If, under its unusual trifurcated capital sentencing scheme, the Florida Supreme Court is free to arbitrarily reject as "unreasonable" a jury life recommendation which is based on factors which can properly be considered as mitigating (i.e., relevant to the character of the offender or the circumstances of

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7/ The disparity between Barclay and Hawkins on the one hand, and White and petitioner's case on the other, could perhaps be reconciled if the evidence failed to show lesser culpability or a follower's role in the cases where the override was upheld. But, as will be demonstrated in Question II, infra, that is clearly not the case. In point of fact, Barclay (who will live) plainly had a much greater level of culpability for his murder than Beauford White (who is dead) had in his. In the present case, the evidence which convinced the jury that petitioner's role was essentially that of an aider and abetter (and which showed unequivocally that Rufus Stevens planned the robbery and abduction of Mrs. Tolin in petitioner's absence) came from the state's own witnesses.

the offense), then the constitutional principle of Lockett and Eddings is rendered ineffectual. As Justice Marshall, dissenting from the denial of certiorari in Eutzy v. Florida, supra [8], recognized:

> Although the State of Florida has adopted a system of capital sentencing that allows a trial judge to overturn a sentencing jury's finding as to the inappropriateness of death--and although this Court has upheld that system as constitutional, see Spaziano v. Florida, 468 U.S. 447, 82 L.Ed.2d 340, 104 S.Ct. 3154 (1984)--that system nevertheless remains subject to the dictates of Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops 3d 26 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982). In Florida, as in other States, a capital defendant has a right to a sentencer who is free to consider and weigh, within the broadest bounds of relevance, "'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Id., at 110, 71 L.Ed.2d 1, 102 S.Ct. 869 (quoting Lockett, supra, at 604, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops 3d 26)(emphasis added).
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> This principle must govern judges responsible for sentencing, Eddings, supra, just as it must govern juries. In Florida, it must govern both, for the state scheme purports to split sentencing authority between the two. Although the judge has the power to override, that power is limited, for the judge may not exercise plenary discretion as to the issue of mitigation. To the contrary, the State has repeatedly purported to limit the judicial override to those cases where "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (1975). Unfortunately, regardless of this supposed limit--a limit that the State cited to this Court when arguing for the constitutionality of its sentencing process,

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[8] See also Heiney v. Florida, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984) (Marshall, J., joined by Brennan, J., dissenting from the denial of certiorari).

> Spaziano, supra, at 465, 82 L.Ed.2d 340, 104 S.Ct. 3154--the State has administered capital sentencing in a manner that allows the override to repeatedly denigrate the principle of Lockett and Eddings. See e.g., Heiney v. Florida, 469 U.S. 920, 83 L.Ed.2d 237, 105 S.Ct. 303 (1984) (Marshall, J., dissenting from denial of certiorari).
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> In this case, the Florida Supreme Court took another step in the erosion of Lockett and Eddings, affirming a judge's sentence of death over a jury's finding for life on the ground that certain mitigating factors that likely stood behind the jury's finding were simply invalid as a matter of law, and the jury's verdict was therefore reversible within the Tedder rule. Under Lockett and Eddings that legal determination is simply wrong as a matter of federal law. It embodies a view of mitigation that is violative of the Eighth Amendment. To prevent this denigration of one of the most important aspects of our Eighth Amendment law, I would grant review in this case.

The mitigating factor which was at issue in Eutzy was the defendant's future non-dangerousness [9], based on the fact that, if sentenced to life imprisonment, he would be nearly seventy years old before becoming eligible for parole. On direct appeal, the Florida Supreme Court had rejected this consideration as "unreasonable" and irrelevant as a matter of law, saying:

> "[T]he crucial flaw in appellant's argument is that he mistakes the nature of mitigation. Mitigating circumstances must, in some way, ameliorate the enormity of a defendant's guilt. For this reason, age is a mitigating circumstance when it is relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them. One who has attained an age of responsibility cannot reasonably raise as a shield against the death penalty the fact that, twenty-five years hence, he will no longer be young."

Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984)

Justice Marshall expressed the opinion that it was the Florida Supreme Court, not Eutzy, which misunderstood the nature of mitigation. He wrote:

> It may be that the argument proffered by [Eutzy] would prove unpersuasive to a sentencing authority, but it is

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[9] See Skipper v. South Carolina, supra.

> simply wrong to hold that it is legally irrelevant. In the State's view, legitimate mitigation is limited to the consideration of factors that would reduce the moral culpability of the defendant and thus the need for moral retribution. But this Court has never limited the circumstances relevant to a capital sentencing determination in such a way.
>
> * * *
>
> This Court, in Lockett and then more decisively in Eddings, held that any aspect of a case that could rationally support mitigation must be deemed a legally valid basis for mitigation. There is certainly nothing irrational - indeed, there is nothing novel - about the idea of mitigating a death sentence on the basis that a life sentence, even with the possibility of parole, will sufficiently render a defendant non-dangerous to the outside society until he is of an age where he likely will no longer present a significant threat of violence. Under federal law, a capital defendant has a right to a sentencer who may consider such a factor for mitigation. But under Florida law, a life sentence based on such a factor shall now be subject to override as irrational. The Florida courts cannot be allowed to use their override system to erode the rights protected by Lockett and Eddings. The fact that they are doing so is reason enough to grant review.

Eutzy v. Florida, supra, 85 L.Ed.2d at 338-339 (Marshall, J. dissenting from denial of certiorari).

Another large chunk out of the protection afforded by Lockett and Eddings has been eroded by the Florida Supreme Court's decision in the instant case. This time, the mitigating circumstances relied on by petitioner in seeking and obtaining a life recommendation from the jury were factors "that would reduce the moral culpability of the defendant" [see Eutzy v. Florida, supra], or which "[would], in some way, ameliorate the enormity of [the] defendant's guilt" [see Eutzy v. State, supra, at 759]. Specifically, petitioner relied on the evidence (most of it presented by the state) that (1) Rufus Stevens formulated the plan to rob the Majik Market and to abduct Mrs. Tolin from the store an hour and a half before Stevens and Nathan Hamilton picked up petitioner; (2) when Stevens was recruiting petitioner to assist him, he told him about the

robbery, but not about the already planned abduction; (3) the state's main witness, Hamilton, told police that Rufus Stevens killed the victim with petitioner's knife; (4) when Hamilton asked petitioner why they had killed the girl, petitioner replied that Rufus "went crazy" because he thought she was going to identify them [10]; and (5) according to Hamilton, who was a relative and close friend of Rufus Stevens, Stevens was a stronger and more dominant personality than petitioner (an opinion which appears to have been corroborated by Stevens' undisputed role as the planner of, and the recruiter for, the crime). [11]

It is absolutely clear that the basis for the jury's life recommendation was in fact a determination, based on the evidence, that petitioner was significantly less culpable than Stevens. First of all, during its guilt phase deliberations, the jury returned with several questions to the effect of "Do we have to be convinced that the defendant personally killed the victim to render a [verdict] of murder in the first degree?" But perhaps even more revealing is the argument by the prosecutor in the penalty phase:

> You're concerned whether he had to have actually thrust the knife on her. I know you were concerned about that. You asked questions during the trial about it and we lawyers are and the Judge is concerned about it. We couldn't answer your questions because of the law and I understand the law but we did the best we could and the Judge did the best he could. But if you believe, if you believe that Rufus Stevens killed that girl for the purpose of not being identified, that he formed the intent to kill her for that purpose, that is first degree murder and then if you believe that he gave this knife to Rufus Stevens, you find he is just as guilty as Rufus Stevens.
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> * * *
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> I don't care if Rufus did it, if Rufus Stevens did it, I don't care if he actually put his hand or whatever it was, he was there. You can't any more

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[10] As Hamilton had previously testified, it was his [Hamilton's] own concern about identification which had prompted Stevens' decision, made in petitioner's absence, to abduct Mrs. Tolin from the store.

[11] Petitioner's trait of being a "follower" was further corroborated by the testimony, at the resentencing hearing, of his mother and sister.

> separate him from that death car for one split second, you can't separate him from that death car that night from 2:00 o'clock in the morning until daylight, you can't separate them from that car, you got to put Kay Tolin in it and you got to put that murderer in it and you got to put Scott Engle in it. He's there, she's there and it all happened there or right around him.

The prosecutor may not have cared if Rufus Stevens did it, but the jury (as evidenced by its life recommendation) obviously did care. The effect of the Florida Supreme Court's affirmance of the override and death sentence in this case is to hold that the jury was not entitled to care -- i.e., that these are not relevant or appropriate considerations in mitigation, unless the defendant can convince the appellate court that he "played no part in the brutal slaying" (Engle v. State, supra, at 884). As in Eutzy, but perhaps to an even greater degree, the Florida Supreme Court has once again misunderstood the nature of mitigating circumstances, and, consequently, has failed to recognize the reasonable basis for the jury's recommendation of life. As a result, the affirmance of petitioner's death sentence violates the basic constitutional principles of Lockett, Eddings, and Sumner v. Shuman. Moreover, in view of the fact that the Florida Supreme Court has rejected as "unreasonable" in the instant case a life recommendation which was based on exactly the same mitigating considerations which were accepted as reasonable in Barclay v. State, supra, and Hawkins v. State, supra, and in view of the fact that that Court has declined to acknowledge, much less adhere to, its own existing precedent, petitioner submits that the Florida Supreme Court has adopted an arbitrary and capricious standard of review in "life override" cases which renders the override provision unconstitutional. See Godfrey v. Georgia, supra. [See Question II].

QUESTION II.

WHETHER THE FLORIDA SUPREME COURT HAS ADOPTED A METHOD OF REVIEW IN "LIFE OVERRIDE" CASES WHICH IS SO ARBITRARY AND CAPRICIOUS AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS' REQUIREMENTS OF HEIGHTENED RELIABILITY AND CHANNELLED DISCRETION IN CAPITAL CASES.

Elwood Barclay, David Hawkins, Beauford White, and Scott Engle all received life recommendations from Florida juries based on their comparatively lesser degree of culpability vis-a-vis one or more co-perpetrators. Barclay will live. Hawkins will live. White died in the electric chair in August, 1987. If the Florida Supreme Court's decision in the instant case is allowed to stand, Engle will die in the electric chair. There is no principled way of reconciling the Florida Supreme Court's decisions in these cases.

In the instant case, the Florida Supreme Court (after a highly selective recitation of the facts, from which much of the evidence of petitioner's lesser culpability was omitted) said "It would be unreasonable under these circumstances to conclude that [petitioner] played no part in the brutal slaying. Hence, there was not a reasonable basis for the jury's recommendation of life imprisonment." Engle v. State, supra, at 884. Yet it would have been equally unreasonable, if not more so, for Elwood Barclay's jury [12] to have concluded that he played no part in the brutal slaying for which he was convicted. In that case [13], Barclay, Dougan, and three others, all members of a group that termed itself the Black Liberation Army, decided to kill a randomly chosen white "devil" for the purpose of starting a racial war. They drove around the city, armed with a pistol and a knife, and stopped several times to observe potential victims, but decided that the circumstances were not advantageous. At one stop, Dougan (the leader) wrote out a note which was to be placed on the body of the victim ultimately chosen for death. Eventually, they picked up an eighteen year old hitchicker, and, over his protest, drove him to an isolated trash dump. The victim was ordered

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[12] A Jacksonville jury, as was petitioner's.

[13] The facts of the case are set forth in Barclay v. State, 343 So.2d 1266 (Fla. 1977).

out of the car, thrown to the ground, and Barclay stabbed him repeatedly with a knife. Dougan then put his foot on the victim's head and shot him in the ear and cheek.

On these facts, the Florida Supreme Court held that the jury's recommendation of life imprisonment for Barclay was reasonable[14]:

> The jury apparently distinguished between Barclay and his main co-defendant, Jacob John Dougan, as evidenced by its recommendations of life imprisonment for Barclay (the follower) and death for Dougan (the leader). We hold that there was a rational basis for the jury's distinction between these co-defendants and that the trial court erred in overriding the jury's recommendation.

Barclay v. State, 470 So.2d 691, 695 (Fla. 1985)

Thus, in Barclay, the state Supreme Court held that there was a reasonable basis for the jury's life recommendation -- i.e., Barclay's lesser culpability as compared with Dougan -- even though the evidence clearly showed (1) that Barclay was one of the individuals who had planned to commit the murder even before the victim was selected, and (2) that Barclay personally inflicted repeated stab wounds on the victim before Dougan shot him. Obviously, in Barclay, the reasonableness of the jury's life recommendation did not hinge on whether Barclay could show that he "played no part in the brutal slaying" [Contrast Engle, supra, at 884].

See also Hawkins v. State, 436 So.2d 44 (Fla. 1983) (finding that there was a reasonable basis for the jury's life recommendation, where jury determined that co-defendant, not Hawkins, was the trigger-man; life recommendation was reasonable notwithstanding testimony of a state witness - relied upon by the trial court in imposing the death sentence -- that Hawkins had stated earlier in the evening of the murders that he wanted to go out to Golden Gate and "blow away a couple of dudes").

If comparatively lesser culpability (falling far short of complete non-involvement in the actual killing) was a valid mitigating consideration upon which a jury could distinguish Barclay from Dougan, and Hawkins from Troedel, then how can it not be a valid mitigating consideration upon which a jury can distinguish Scott Engle from Rufus Stevens, or Beauford White from Ferguson and Francois?

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[14] The procedural history of the Barclay appeal is set forth in petitioner's brief in the Florida Supreme Court [Appendix E. p.30-33].

In the latter case, White, along with Ferguson and Francois, committed an armed robbery of Margaret Wooden at her home.[15] While the robbery was in progress, Stocker (the owner of the home) arrived with five of his friends, and Ms. Wooden's boyfriend also arrived. The victims were forced to lie face down on the floor with their hands tied, while the robbers searched the house and the victims' persons for money, jewelry, and drugs. At some point, one of the intruders' mask fell from his face, and a discussion ensued as to the need for killing the victims. Beauford White was opposed to the killings, but nevertheless Ms. Wooden and her boyfriend were taken by Ferguson to the bedroom where he [Ferguson] shot them in the head, while Francois systematically shot the six victims who remained in the living room. [Ms. Wooden and one Hall survived and testified at trial, identifying Ferguson and Francois as the persons who did the shooting]. After the killings, the three robbers and Adolphus Archie (the "wheelman") met in a motel room and divided the proceeds of the robbery. Archie testified that Beauford White was upset, and refused to participate in the disposal of the weapons.

White's twelve member jury returned a unanimous life recommendation. White v. State, supra, 403 So.2d at 334. The Florida Supreme Court, purporting to apply the Tedder standard, held that the fact suggesting a sentence of death for White were so clear and convincing that no reasonable person could differ. White v. State, supra, 403 So.2d at 339. Ironically, the Florida Supreme Court emphasized that White's moral and legal culpability was much greater than Adolphus Archie's (403 So.2d at 341), but failed to recognize that the jury could quite reasonably have concluded that White's moral and legal culpability was also much less than Ferguson's and Francois'.

There is no way that White can be squared with Barclay. Barclay was involved from the earliest stages in a planned and calculated racially-motivated murder of a randomly selected victim, and when the victim was finally chosen and isolated, Barclay was the one who stabbed him repeatedly before Dougan shot him. Yet because he

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[15] The circumstances in White's case are set forth in White v. State, 403 So.2d 331, 333, 338-339 (Fla. 1981). See also State v. White, 470 So.2d 1377 (Fla. 1985).

was comparatively less culpable than the leader, Dougan, the Florida Supreme Court recognized the reasonableness of the jury's life recommendation, and gave it effect. White, in stark contrast, opposed Ferguson's and Francois' decision to murder the victims, did not participate in the actual killings, and refused to help dispose of the weapons. Yet because of White's full participation in the robbery, because he "did nothing to prevent or otherwise disassociate himself from the murders when they took place" (403 So.2d at 338), and because he was more culpable than the wheelman, the Florida Supreme Court completely failed to recognize the legitimacy of the mitigating circumstance of White's lesser degree of culpability vis-a-vis Ferguson and Francois as the basis for the jury's life recommendation.

In the present case, if the Florida Supreme Court had followed the principles it recognized in Barclay and Hawkins, petitioner would have been given the benefit of the jury's life recommendation based on his comparatively lesser culpability vis-a-vis Rufus Stevens, and his role as a follower in a crime planned by Stevens. If, on the other hand, the Florida Supreme Court had followed the (constitutionally unsound) precedent of White, petitioner's death sentence would be affirmed. When the decision was issued, the Florida Supreme Court (not atypically) made no mention at all of Barclay or Hawkins and made no effort to explain why what it said in those cases should not apply to petitioner as well. Nor, for that matter, did the Florida Supreme Court rely on White. Instead it merely gave the talismanic citation to Tedder and then proceeded to determine the propriety of the jury's life recommendation on an ad hoc basis (and on a selective and misleading recitation of the evidence which petitioner had relied on in support of the life recommendation).[16/]

One of the most pernicious consequences of the Florida Supreme Court's adoption of two irreconcilable lines of cases on the question of whether a defendant's comparatively lesser culpability is a valid basis for a life recommendation [Barclay; Hawkins], or whether, in the absence of a showing that he played no significant part in the crime, it is an unreasonable basis and subject to an override [White; Engle], is the effect on defense counsel's decision-

16/ See p.10, n.6 of this petition for certiorari.

making at the trial level. Is it a wise (or even a competent) strategy to emphasize comparative culpability to the jury in the penalty phase, when the evidence would support such an argument? If the attorney reads Barclay, he will conclude that it is entirely appropriate. If, on the other hand, he reads White or the opinion in petitioner's case, he will conclude that (unless his client is a wheelman) it is a very dangerous strategy, and he'd better take a different approach. The opinions in Barclay, White, Hawkins, and Engle -- collectively -- stand for the proposition that trying a penalty phase or appealing a "life override" under Florida's capital sentencing scheme is akin to Russian Roulette.

This is not merely a question of whether the constitution requires jury sentencing in death penalty cases [Contrast Spaziano v. Florida, supra]. This is a question of whether the Florida Supreme Court can continue to administer and interpret its peculiar "life override" provision in such a way as to denigrate a wide variety of legitimate -- even traditional -- mitigating circumstances, and to leave defendants, attorneys, jurors, and trial judges without a clue as to which (or when) mitigating circumstances qualify as reasonable grounds for a life recommendation. The instant case is not an isolated one, nor is it an aberration. As Justice Marshall perceived in dissenting from the denial of certiorari in Heiney and Eutzy, the Florida "override" system frequently -- and inherently -- produces arbitrary and irreconcilable decisions as to which defendants will live and which will die, and produces opinions which subtly but insidiously disparage legitimate mitigating factors, by labeling juries "unreasonable" for considering those factors as a basis for a life recommendation. This Court should grant certiorari and resolve the confusion.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, petitioner, GREGORY SCOTT ENGLE, respectfully requests that this Court issue a writ of certiorari to the Supreme Court of Florida.

Respectfully submitted,

BY: Steven L Bolotin

STEVEN L. BOLOTIN
Polk County Courthouse
P.O. Box 9000--Drawer PD
Bartow, Florida 33830

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furhished by U.S. Mail to the Honorable Joseph F. Spaniol, Jr., Clerk of the Supreme Court of the United States, First and Maryland Avenue, Northeast, Washington, D.C., 20543; Gregory Scott Engle, #069240, Florida State Prison, P.O. Box 747, Starke, Florida 32091; the Honorable Sid J. White, Clerk of the Supreme Court, State of Florida, Tallahassee, Florida 32301; and to the Office of the Attorney General (Criminal Appeals), Attention Ms. Elizabeth Masters, The Capitol, Tallahassee, Florida 32301, this 2nd day of November, 1987.

Steven L Bolotin
STEVEN L. BOLOTIN

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

GREGORY SCOTT ENGLE,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

APPENDIX

APPENDIX

"Because the jury at the original sentencing proceeding recommended life imprisonment, the more favorable to appellant of the only two recommendations available, we deem the error harmless with regard to its effect on the advisory verdict portion of the proceedings. Therefore, there will be no need to empanel a new advisory jury for the proceedings on remand. On remand the trial court will take into consideration the recommendation returned by the original trial jury in this case.

The order of the court below, denying appellant's rule 3.850 motion, is affirmed insofar as the claims of ineffective assistance of counsel, judicial bias, improper aggravating circumstances, erroneous standard of proof for mitigating circumstances, racial discrimination and arbitrary sentencing are concerned. Regarding the claim that the original trial court judge limited his own consideration to statutory mitigating circumstances, we reverse the denial of the rule 3.850 motion and remand with directions to vacate the sentence of death and conduct a new sentencing proceeding without a jury.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ., concur.

BARKETT, J., concurs in the result only.

Gregory Scott ENGLE, Appellant,
v.
STATE of Florida, Appellee.
No. 68548.
Supreme Court of Florida.
June 25, 1987.
Rehearing Denied Sept. 3, 1987.

On remand from the Court of Appeals, 438 So.2d 803, defendant was sentenced to death by the Circuit Court, Duval County, John E. Santora, Jr., J., upon conviction for first-degree murder, and he appealed. The Supreme Court held that: (1) imposition of death sentence was permissible based on defendant's participation in the crime, and (2) trial court properly overrode jury's recommendation for sentence of life imprisonment.

Affirmed.

Barkett, J., dissented and filed an opinion.

1. Homicide ⇐354

Imposition of death penalty on defendant convicted of murder of convenience store clerk was permissible where the evidence clearly supported the conclusion that he was directly involved in the abduction and death of the victim and that he and his accomplice were major participants in the crime which necessarily contemplated the use of illegal force.

2. Homicide ⇐354

If there is a reasonable basis for jury's recommendation of sentence of life imprisonment in capital murder case, that recommendation must be given effect.

3. Homicide ⇐354

Trial court properly overrode jury's recommendation of life imprisonment and imposed death sentence where defendant admitted his participation in the abduction of the homicide victim, and acknowledged that he was with his accomplice during the entire span of time within which the victim was murdered where defendant's knife caused fatal stab wounds, and where defendant returned from crime scene with some of the money from robbery of store where victim worked.

Steven L. Bolotin, Office of Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen. and Andrea Smith Hillyer, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This case comes before us once again on review of a sentence of death. Art. V, § 3(b)(1), Fla. Const. In *Engle v. State*, 438 So.2d 803 (Fla.1983), *cert. denied*, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984), we affirmed appellant's conviction of first-degree murder but reversed the sentence of death, because in overriding the jury's recommendation of life imprisonment the trial judge had considered a confession of another person which had been introduced at a separate trial. Upon reversal the court below held another sentencing hearing and again sentenced appellant to death.

Testimony at trial indicated that at about 3:50 a.m. on March 13, 1979, Eleanor Kathy Tolin was present at a Majik Market in Jacksonville where she worked as a cashier. Approximately thirty minutes later the store was found unlocked and unattended and sixty-seven dollars was missing from the cash drawer. On the following day Tolin's body was found in a wooded area. It was apparent from scratches on her face that she had been dragged some distance, though she was probably dead at the time. The medical examiner, Dr. Florio, determined from his autopsy that the cause of death was ligature strangulation and multiple stab wounds in the back. He said that the victim was alive at the time of the strangulation. Dr. Florio found a four-inch laceration in the interior of the vagina which he believed was most likely caused by the insertion of a hand and the making of a fist. Because of bleeding Dr. Florio concluded that Tolin was alive when this occurred.

Several days later, as a result of a traffic stop, police learned that Nathan Hamilton knew something about the murder. Based on information obtained from Hamilton, appellant and Rufus Stevens* were arrested for Tolin's murder. When interviewed by the police, appellant denied taking part in the Majik Market robbery. He told detectives that on March 13, 1979, he had been riding around drinking beer with Stevens from 2:00 a.m. until daybreak. The police showed him a Buck pocketknife engraved with the initials S.E. which he acknowledged looked like his knife.

At trial, Hamilton testified that at about 8:00 p.m. on March 12, 1979, he and Stevens began driving around and drinking together. Stevens suggested that they rob a motel, but after stopping at the Majik Market where Tolin worked, Stevens stated that they ought to rob the Majik Market. When Hamilton objected that the clerk could identify them as they both lived in the neighborhood, Stevens said they could take her out of the store and get her away from the phone. Stevens and Hamilton picked up appellant between 1:30 a.m. and 2:00 a.m. Stevens asked appellant if he wanted to rob a Majik Market and appellant agreed to do so. Stevens and appellant then dropped Hamilton off at his apartment.

At the trial Hamilton identified the knife with appellant's initials as belonging to appellant and said he had never seen appellant without it. He further testified that several days after the murder Stevens told him that "We got to get rid of Scott's [appellant's] knife because that was what it was done with." At Stevens' request Hamilton tried to get the knife from appellant the next evening telling him that Stevens had said the knife was used to commit the murder. Appellant tossed his knife to Hamilton and asked if he saw any blood on it, but he would not let Hamilton have the knife. Hamilton asked appellant if he thought it was worth "a lousy fifty or sixty dollar robbery to take a girl out of a store and kill her." Appellant replied that he did not. When Hamilton asked him why he did it, appellant said that when they got her out of the store Stevens went crazy and started saying she was going to identify them. Hamilton told police that he thought appellant would be the easier of the two from whom to obtain a confession.

* Stevens was convicted of Tolin's murder in a separate trial. The judge overrode the jury's recommendation of life imprisonment and sentenced Stevens to death. The judgment and sentence were affirmed in *Stevens v. State*, 419 So.2d 1058 (Fla.1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983).

Appellant's landlady testified that in the early morning of the day the murder was committed appellant came into the house counting money. He told her that he had been drinking beer with Stevens and that Stevens had given him twenty dollars. Several witnesses testified to a conversation that occurred between Stevens and appellant on the day of their arrest. At that time Stevens warned appellant that Hamilton might be turning them in for Tolin's murder. Appellant replied that he had no reason to run. He said that the police couldn't prove anything, but later he did try to hide his knife.

Bloodstains found on Stevens' car and on the knife identified as belonging to appellant matched Tolin's blood type, but not that of appellant or Stevens. The knife was of a type consistent with the stab wounds in Tolin's back. There were dried semen stains of undetermined origin on the backseat of Stevens' car. Hair found on the backseat and floorboard of Stevens' car likely came from the victim. A broken kitchen knife found hidden under Stevens' house trailer could have caused the mark on the victim's back below the three stab wounds.

On resentencing the court found the following aggravating circumstances:

A. THE FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED, OR WAS AN ACCOMPLICE, IN THE COMMISSION OF, OR IN ATTEMPTING TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, A ROBBERY, SEXUAL BATTERY, ARSON, BURGLARY, KIDNAPPING, OR AIRCRAFT PIRACY OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

B. THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

C. THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

D. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The court again found no mitigating circumstances.

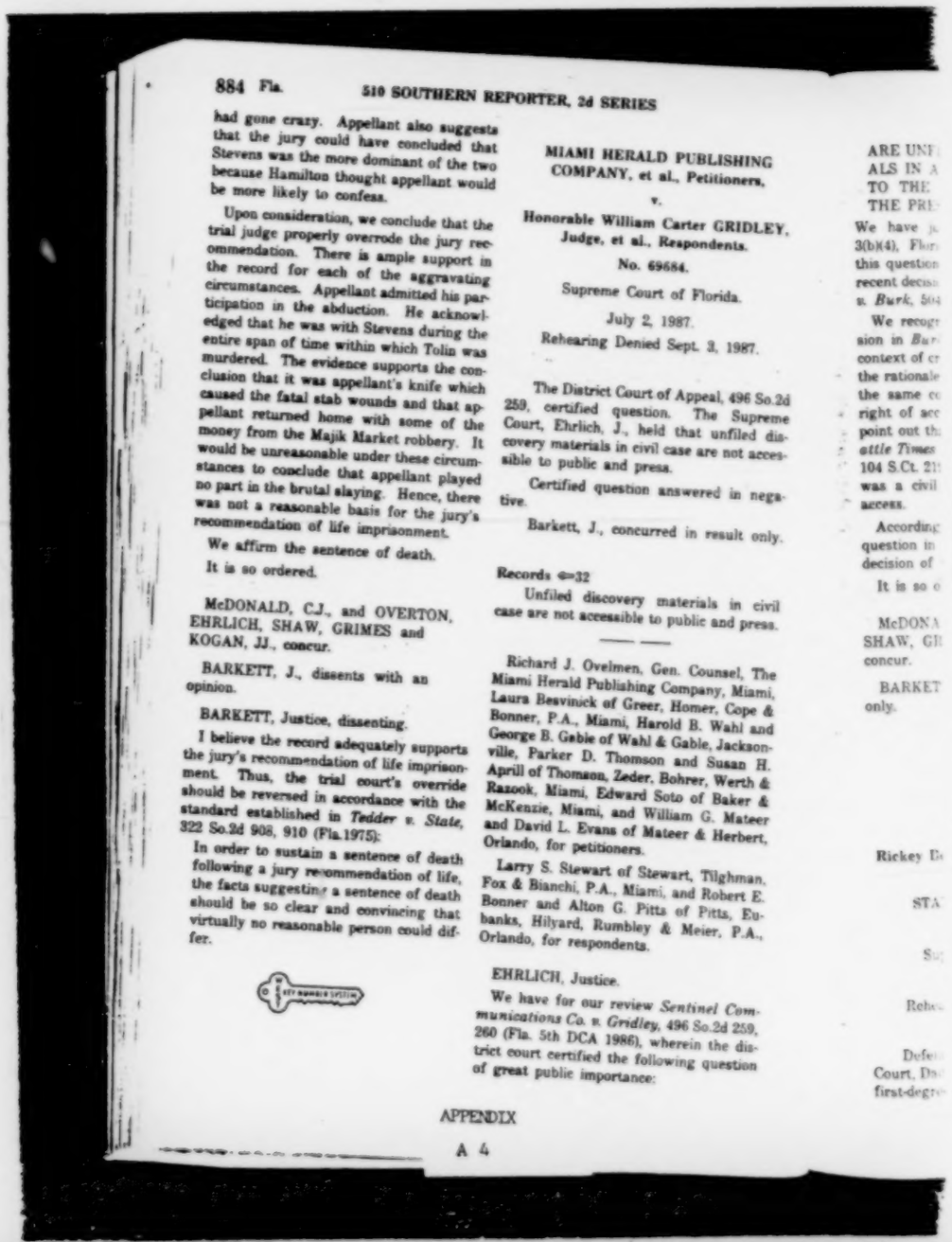
[1] Appellant first argues that the United States Supreme Court's opinion in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), precludes the imposition of death in this case. In *Enmund* the Court said:

> Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.

458 U.S. at 797, 102 S.Ct. at 3376, 73 L.Ed.2d at 1151.

We have no difficulty in deciding that the principle of *Enmund* is not applicable in this case. The evidence clearly supports the conclusion that appellant was directly involved in the abduction and murder of Mrs. Tolin. As in *Jackson v. State*, 502 So.2d 409 (Fla.1986), appellant and Stevens both were major participants in the crime which necessarily contemplated the use of lethal force.

[2, 3] The closer issue is whether it can be said that there existed a reasonable basis for the jury's recommendation of life. If so, that recommendation must be given effect. *Tedder v. State*, 322 So.2d 908 (Fla.1975). Appellant does not seriously argue that what was done to Tolin does not warrant imposition of the death penalty. In essence, he contends that the jury recommendation was plausible because there was no direct evidence that appellant, rather than Stevens, actually did the killing. Appellant points out that it was Stevens' idea to rob the Majik Market and refers to his own statement to police that Stevens



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had gone crazy. Appellant also suggests that the jury could have concluded that Stevens was the more dominant of the two because Hamilton thought appellant would be more likely to confess.

Upon consideration, we conclude that the trial judge properly overrode the jury recommendation. There is ample support in the record for each of the aggravating circumstances. Appellant admitted his participation in the abduction. He acknowledged that he was with Stevens during the entire span of time within which Tolin was murdered. The evidence supports the conclusion that it was appellant's knife which caused the fatal stab wounds and that appellant returned home with some of the money from the Majik Market robbery. It would be unreasonable under these circumstances to conclude that appellant played no part in the brutal slaying. Hence, there was not a reasonable basis for the jury's recommendation of life imprisonment.

We affirm the sentence of death.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ., concur.

BARKETT, J., dissents with an opinion.

BARKETT, Justice, dissenting.

I believe the record adequately supports the jury's recommendation of life imprisonment. Thus, the trial court's override should be reversed in accordance with the standard established in *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975):

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

MIAMI HERALD PUBLISHING COMPANY, et al., Petitioners,

v.

Honorable William Carter GRIDLEY, Judge, et al., Respondents.

No. 69684.

Supreme Court of Florida.

July 2, 1987.

Rehearing Denied Sept. 3, 1987.

The District Court of Appeal, 496 So.2d 259, certified question. The Supreme Court, Ehrlich, J., held that unfiled discovery materials in civil case are not accessible to public and press.

Certified question answered in negative.

Barkett, J., concurred in result only.

Records ⇐32

Unfiled discovery materials in civil case are not accessible to public and press.

Richard J. Ovelmen, Gen. Counsel, The Miami Herald Publishing Company, Miami, Laura Besvinick of Greer, Homer, Cope & Bonner, P.A., Miami, Harold B. Wahl and George B. Gable of Wahl & Gable, Jacksonville, Parker D. Thomson and Susan H. Aprill of Thomson, Zeder, Bohrer, Werth & Razook, Miami, Edward Soto of Baker & McKenzie, Miami, and William G. Mateer and David L. Evans of Mateer & Herbert, Orlando, for petitioners.

Larry S. Stewart of Stewart, Tilghman, Fox & Bianchi, P.A., Miami, and Robert E. Bonner and Alton G. Pitts of Pitts, Eubanks, Hilyard, Rumbley & Meier, P.A., Orlando, for respondents.

EHRLICH, Justice.

We have for our review *Sentinel Communications Co. v. Gridley*, 496 So.2d 259, 260 (Fla. 5th DCA 1986), wherein the district court certified the following question of great public importance:

ARE UNF… ALS IN A… TO THE… THE PRE… We have ju… 3(b)(4), Flor… this question… recent decisi… v. *Burk*, 504… We recogn… sion in *Bur*… context of cr… the rationale… the same co… right of acc… point out th… *attle Times*… 104 S.Ct. 21… was a civil… access. According… question in… decision of… It is so o… McDONA… SHAW, GR… concur. BARKET… only. Rickey D… STA… Su… Rehe… Defe… Court, Di… first-degr…

APPENDIX

A 4

IN THE SUPREME COURT OF FLORIDA

GREGORY SCOTT ENGLE,	:	
Appellant,	:	
vs.	:	Case No. 68,548
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

MOTION FOR REHEARING

Appellant, GREGORY SCOTT ENGLE, pursuant to Fla.R.App.P. 9.330, files this motion for rehearing, and says:

1. In its opinion issued June 25, 1987, this Court affirmed appellant's death sentence, concluding that there was "not a reasonable basis" for the jury's recommendation of life imprisonment. This Court stated:

> ...[W]e conclude that the trial judge properly overrode the jury recommendation. There is ample support in the record for each of the aggravating circumstances. Appellant admitted his participation in the abduction. He acknowledged that he was with Stevens during the entire span of time within which Tolin was murdered. The evidence supports the conclusion that it was appellant's knife which caused the fatal stab wounds and that appellant returned home with some of the money from the Majik Market robbery. It would be unreasonable under these circumstances to conclude that appellant played no part in the brutal slaying. Hence, there was not a reasonable basis for the jury's recommendation of life imprisonment.

2. In placing the burden on appellant to prove that he "played no part" in the killing, this Court misapplied the Tedder[1/] standard, denigrated a number of statutory and non-statutory mitigating circumstances, and ignored the established precedent of Barclay v. State, 470 So.2d 691 (Fla.1985); and Hawkins v. State, 436 So.2d 44 (Fla. 1983). Under these circumstances, this Court's affirmance of appellant's death sentence violates due process, and the Eighth and Fourteenth Amendments of the United States Constitution. See Godfrey v. Georgia, 446 U.S. 420 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Eutzy v. Florida, __U.S.__, 105 S.Ct.

1/ Tedder v. State, 322 So.2d 908 (Fla.1975).

APPENDIX

B

2062 (1985)(Marshall, J., joined by Brennan, J., dissenting from denial of certiorari).

3. Until now, this Court has not held that a jury life recommendation is unreasonable unless the defendant "played no part" in the killing. [To the contrary, in the previous cases, both Barclay and Hawkins played a substantial part in the respective murders, yet this Court held that the jury could reasonably draw a distinction between the leader and the follower, between the more culpable and the less culpable, and that therefore the jury recommendations of life for Barclay and for Hawkins should be given effect. Barclay v. State, supra; Hawkins v. State, supra]. Nor does the validity of a jury life recommendation depend on whether the trial judge found any mitigating circumstances; rather, the Tedder standard requires an inquiry into whether the jury could reasonably have based its recommendation on statutory or non-statutory mitigating factors, in its view of the evidence. See Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981); Gilvin v. State, 418 So.2d 996,999 (Fla.1982); Cannady v. State, 427 So.2d 723,731 (Fla.1983); Barclay v. State, supra, at 695; Amazon v. State, 487 So.2d 8,13 (Fla.1986). Since, in the present case, there was clearly evidence[2/] to support the jury's view that Rufus Stevens, not appellant, was the leader, planner, and dominant participant in the abduction and murder, and that it was Stevens, not appellant, who "went crazy" and stabbed the victim to death with appellant's knife, it appears that this Court is holding as a matter of law that, in the absence of a showing that appellant "played no part" in the homicide, his lesser culpability as compared with Stevens, and his role as a follower rather than a leader, are not valid mitigating circumstances.[3/] Not only is this conclusion irreconcilable with Barclay and Hawkins, it is also contrary to the constitutional

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2/ Much of it supplied by the state's star witness, Nathan Hamilton.

3/ This is necessarily the import of this Court's affirmance of appellant's death sentence, because if these were recognized as valid considerations in mitigation, then, a fortiori, the jury's life recommendation based thereon would be recognized as reasonable. Welty; Gilvin; Cannady; Barclay; Amazon.

principles recognized in Lockett v. Ohio, supra, and Eddings v. Oklahoma, supra.

4. When the trial court or this Court rejects as "unreasonable" a jury life recommendation which is based on factors which can properly be considered as mitigating, the constitutional principle of Lockett and Eddings is rendered ineffectual. As Justice Marshall, dissenting from the denial of certiorari in Eutzy v. Florida, supra,[4/] recognized:

> Although the State of Florida has adopted a system of capital sentencing that allows a trial judge to overturn a sentencing jury's finding as to the inappropriateness of death--and although this Court has upheld that system as constitutional, see Spaziano v. Florida, 468 U.S.__, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984)--that system nevertheless remains subject to the dictates of Lockett v. Ohio, 438 U.S.586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104,102 S.Ct. 869, 71 L.Ed.2d 1 (1982). In Florida, as in other States, a capital defendant has a right to a sentencer who is free to consider and weigh, within the broadest bounds of relevance, "'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Id., at 110, 102 S.Ct., at 874 (quoting Lockett, supra, 438 U.S., at 604, 98 S.Ct., 2964) (emphasis added)
>
> This principle must govern judges responsible for sentencing, Eddings, supra, just as it must govern juries. In Florida, it must govern both, for the state scheme purports to split sentencing authority between the two. Although the judge has the power to override, that power is limited, for the judge may not exercise plenary discretion as to the issue of mitigation. To the contrary, the State has repeatedly purported to limit the judicial override to those cases where "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908,910 (Fla. 1975). Unfortunately, regardless of this supposed limit--a limit that the State cited to this Court when arguing for the constitutionality of its sentencing process, Spaziano, supra, 468 U.S., at__, 104 S.Ct., at__--the State has administered capital sentencing in a manner that allows the override to repeatedly denigrate the principle of Lockett and Eddings. See e.g., Heiney v. Florida, 469 U.S.__, 105 S.Ct.303, 83 L.Ed.2d 237 (MARSHALL, J., dissenting from denial of certiorari).
>
> In this case, the Florida Supreme Court took another step in the erosion of Lockett and Eddings, affirming a judge's sentence of death over a jury's finding for life on the ground that certain mitigating factors that likely stood behind the jury's finding were simply invalid as a matter of law, and the jury's verdict was therefore reversible with the Tedder rule.

4/ See also Heiney v. Florida, __U.S., 105 S.Ct. 303 (Fla.1984) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari.

> Under Lockett and Eddings that legal determination is simply wrong as a matter of federal law. It embodies a view of mitigation that is violative of the Eighth Amendment. To prevent this denigration of one of the most important aspects of our Eighth Amendment law, I would grant review in this case.

The mitigating factor that was at issue in Eutzy was the defendant's future non-dangerousness[5/], based on the fact that, if sentenced to life imprisonment, he would be nearly seventy years old before becoming eligible for parole. On direct appeal, this Court had rejected this consideration as "unreasonable" and irrelevant as a matter of law, saying:

> "[T]he crucial flaw in appellant's argument is that he mistakes the nature of mitigation. Mitigating circumstances must, in some way, ameliorate the enormity of a defendant's guilt. For this reason, age is a mitigating circumstance when it is relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them. One who has attained an age of responsibility cannot reasonably raise as a shield against the death penalty the fact that, twenty-five years hence, he will no longer be young."

Eutzy v. State, 458 So.2d 755,759 (Fla.1984).

Justice Marshall expressed the opinion that it was this Court, not Eutzy, which misunderstood the nature of mitigation. He wrote:

> It may be that the argument proffered by [Eutzy] would prove unpersuasive to a sentencing authority, but it is simply wrong to hold that it is legally irrelevant. In the State's view, legitimate mitigation is limited to the consideration of factors that would reduce the moral culpability of the defendant and thus the need for moral retribution. But this Court has never limited the circumstances relevant to a capital sentencing determination in such a way.
>
> * * * * * *
>
> This Court, in Lockett and the more decisively in Eddings, held that any aspect of a case that could rationally support mitigation must be deemed a legally valid basis for mitigation. There is certainly nothing irrational - indeed, there is nothing novel - about the idea of mitigating a death sentence on the basis that a life sentence, even with the possibility of parole, will sufficiently render a defendant non-dangerous to the outside society until he is of an age where he likely will no longer present a significant threat of violence. Under federal law, a capital defendant has a right to a sentencer who

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5/ See Skipper v. South Carolina, __U.S.__, 106 S.Ct. 1669 (1986).

> may consider such a factor for mitigation. But under Florida law, a life sentence based on such a factor shall now be subject to override as irrational. The Florida courts cannot be allowed to use their override system to erode the rights protected by Lockett and Eddings. The fact that they are doing so is reason enough to grant review.

Eutzy v. Florida, supra, 105 S.Ct. at 2064-2065 (Marshall, J., dissenting from denial of certiorari).

5. Another large chunk out of the protection afforded by Lockett and Eddings has been eroded by this Court's decision in the instant case. This time, the mitigating circumstances relied on by the appellant in seeking and obtaining a life recommendation from the jury were factors "that would reduce the moral culpability of the defendant" [see Eutzy v. Florida, supra], or which "[would], in some way, ameliorate the enormity of [the] defendant's guilt" [see Eutzy v. State, supra, at 759]. Specifically, appellant relied on the evidence (most of it presented by the state) that (1) Rufus Stevens formulated the plan to rob the Majik Market and to abduct Mrs. Tolin from the store an hour and a half before Stevens and Nathan Hamilton picked up appellant; (2) when Stevens was recruiting appellant to assist him, he told him about the robbery, but not about the already planned abduction; (3) the state's main witness, Hamilton, told police that Rufus Stevens killed the victim with appellant's knife; (4) when Hamilton later asked appellant why they had killed the girl, appellant replied that Rufus "went crazy" because he thought she was going to identify them[6/]; and (5) according to Hamilton, who was a relative and close friend of Rufus Stevens, Stevens was a stronger and more dominant personality than appellant (an opinion which appears to have been corroborated by Stevens' undisputed role as the planner of, and the recruiter for, the crime).[7/]

6/ As Hamilton had previously testified, it was his [Hamilton's] own concern about identification which had prompted Stevens' decision, made in appellant's absence, to abduct Mrs. Tolin from the store.

7/ Appellant's trait of being a "follower" was further corroborated by the testimony, at the resentencing hearing, of his mother and sister.

It is absolutely clear that the basis for the jury's life recommendation was in fact a determination, based on the evidence, that appellant was significantly less culpable than Stevens. First of all, during its guilt phase deliberations, the jury returned with several questions to the effect of "Do we have to be convinced that the defendant personally killed the victim to render a [verdict] of murder in the first degree?" But perhaps even more revealing is the argument by the prosecutor in the penalty phase:

> You're concerned whether he had to have actually thrust the knife on her. I know you were concerned about that. You asked questions during the trial about it and we lawyers are and the Judge is concerned about it. We couldn't answer your questions because of the law and I understand the law but we did the best we could and the Judge did the best he could. But if you believe, if you believe that Rufus Stevens killed that girl for the purpose of not being identified, that he formed the intent to kill her for that purpose, that is first degree murder and then if you believe that he gave this knife to Rufus Stevens, you find he is just as guilty as Rufus Stevens.

(T993-994)

* * *

> I don't care if Rufus did it, if Rufus Stevens did it, I don't care if he actually put his hand or whatever it was, he was there. You can't any more separate him from that death car for one split second, you can't separate him from that death car that night from 2:00 o'clock in the morning until daylight, you can't separate them from that car, you got to put Kay Tolin in it and you got to put that murderer in it and you got to put Scott Engle in it. He's there, she's there and it all happened there or right around him.

(T995)

The prosecutor may not have cared if Rufus Stevens did it, but the jury (as evidenced by its life recommendation) obviously did care. The effect of this Court's affirmance of the override and death sentence in this case is to hold that the jury was not entitled to care -- i.e., that these are not relevant or appropriate considerations in mitigation, unless the defendant can convince the appellate court that he "played no part in the brutal slaying" (Engle v. State, slip opinion, p.5). As in Eutzy, but perhaps to an even greater degree, this Court has once again misunderstood the nature of mitigating circumstances, and consequently, has failed to recognize the reasonable basis for the jury's recommendation of life. As a result, the

affirmance of appellant's death sentence violates the basic constitutional principles of Lockett and Eddings. Moreover, in view of the fact that this Court has rejected as "unreasonable" in the instant case a life recommendation which was based on exactly the same mitigating considerations which were accepted as "reasonable" in Barclay v. State, supra, and Hawkins v. State, supra, and in view of the fact that this Court has declined to acknowledge, much less adhere to, the existing precedent, appellant submits that this Court has adopted an arbitrary and capricious standard of review in "life override" cases which renders the override provision unconstitutional.[8/] See Godfrey v. Georgia, supra.

WHEREFORE, appellant respectfully requests that this Court grant rehearing, and reduce appellant's sentence to life imprisonment in accordance with the recommendation of the jury.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: Steven L. Bolotin
STEVEN L. BOLOTIN
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COUNSEL FOR APPELLANT

8/ In Spaziano v. Florida, U.S. , 104 S.Ct.3154 (1984), in which the constitutionality of Florida's override provision was upheld, the U. S. Supreme Court recognized the Tedder standard, and expressed the opinion that the Florida Supreme Court takes that standard seriously. In view of the developments in Eutzy v. State, supra, and, especially, in the instant decision, appellant submits that that is no longer the case. As Justice Marshall recognized in dissenting from denial of certiorari in Eutzy and Heiney, Florida's override provision "not only places the defendant in the fundamentally unfair position of having to repetitively justify the appropriateness of one's continued life, it also facilitates the denigration of a variety of mitigating circumstances." Heiney, supra, 105 S.Ct. at 305.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office (Criminal Appeals), The Capital, Tallahassee, Florida, 32301, and to Gregory Scott Engle, Inmate No. 069240, Florida State Prison, P. O. Box 747, Starke, Florida, 32091, by mail on this 8th day of July, 1987.

Steven L Bolotin
STEVEN L. BOLOTIN

Supreme Court of Florida

THURSDAY, SEPTEMBER 3, 1987

GREGORY SCOTT ENGLE, Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO. 68,548 Circuit Court No. 79-1180 CF Div. R (Duval)

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

McDONALD, C.J., OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ., concur
BARKETT, J., dissents

A True Copy
TEST:
Sid J. White
Clerk, Supreme Court

TC
cc: Hon. S. Morgan Slaughter, Clerk
Hon. John E. Santora, Jr., Judge

Steven L. Bolotin, Esquire
Hon. Robert A. Butterworth

5B

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 79-1180-CF

DIVISION:

STATE OF FLORIDA

vs.

GREGORY SCOTT ENGLE

JUDGEMENT AND SENTENCE

By order of the Florida Supreme Court in an opinion dated September 15, 1983, this court was directed to resentence this defendant. Pursuant to the order by the Florida Supreme Court this court held an evidentiary hearing and both the State and the defendant were allowed to present evidence. In resentencing this defendant the court has reassessed all aggravating and mitigating circumstances without taking into consideration inadmissible statements made by Rufus Stevens. Additionally, the court has thoroughly studied the record in this case and considered all arguments by counsel for both the State and the defense.

Evidence produced at trial established that the victim, Kathy Tolin, a young mother of two children, was working as a clerk in a convenience store. Tolin was robbed, abducted, raped, mutilated, and then murdered. This court finds that the evidence presented at trial conclusively establishes that Gregory Engle was an active participant in all phases of this crime and at least contemplated that lethal force be used and finds that the only appropriate sentence is death, for the following reasons:

I. AGGRAVATING CIRCUMSTANCES

A. THE FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED, OR WAS AN ACCOMPLICE, IN THE COMMISSION OF, OR IN ATTEMPTING TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, A ROBBERY, SEXUAL BATTERY, ARSON, BURGLARY, KIDNAPPING, OR AIRCRAFT PIRACY OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

Engle's roommate testified that Engle had been gone all night. The defendant made certain incriminating statements to Nathan Hamilton concerning blood on his knife, and further statements that it had not been worth killing a girl for $50 or $60 dollars.

Other evidence establishing this aggravating circumstance includes: (1) the victim's blood was found on the trunk latch in the car used in the abduction, (2) semen was found on the backseat of the car used in her abduction, and (3) testimony from the Medical Examiner establishing that the victim had been the subject of a violent sexual battery.

The only conclusion a reasonable person could draw from the evidence taken in it's totality is that Kathy Tolin, a young, petite, mother of two, was robbed, kidnapped, brutally raped, and mutilated, before being violently murdered.

B. THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR AFFECTING AN ESCAPE FROM CUSTODY.

The evidence presented at trial conclusively established that Gregory Engle and Rufus Stevens murdered Kathy Tolin to prevent their apprehension. Both Engle and Stevens lived in the neighborhood in which the convenience store was located and both were known to the victim. Additionally, the defendant made statements to a witness concerning Stevens' fear that the victim would identify both he and Stevens.

The only reasonable inference that can be drawn from the evidence is that Kathy Tolin was murdered so that her killers would not be apprehended.

C. THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

Evidence proved beyond any doubt that the murder of Kathy Tolin was the conclusion of a criminal episode that began in the scheme of Engle and Stevens to rob the convenience store.

D. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Testimony established that a large object had been inserted into the victim's vagina causing a severe laceration. After being assaulted, she was brutally murdered. Testimony revealed that the victim was first strangled with a ligature and while she was still

alive an unsuccessful attempt was made to stab her in the back with a broken knife later found to belong to Rufus Stevens. The knife belonging to Gregory Engle was used to repeatedly stab her in the back penetrating her lungs.

The evidence established beyond any doubt that Kathy Tolin's murderers by their acts, cruelly inflicted unbelievable terror, wickedness, and cruelty all of which were designed to inflict a high degree of pain with utter indifference to the suffering of Kathy Tolin.

III. MITIGATING CIRCUMSTANCES

The Court finds there exists no mitigating circumstances.

IV. SENTENCE

After careful consideration of all statutory aggravating circumstances and statutory and non-statutory mitigating circumstances, this court finds there are four aggravating circumstances and no mitigating circumstances. This crime was accompanied by such extraordinary facts as to clearly set it apart from the norm of capital felonies. Therefore, Gregory Scott Engle is hereby adjudicated Guilty of Murder in the First Degree and is hereby sentenced to death by electrocution. Sentence of Death shall be executed upon the Governor issuing a warrant, attaching it to the copy of the record, and transmitting it to the Superintendent of the State Prisons, directing him to execute the sentence at the time designated in the warrant.

This sentence of Death is subject to automatic review by the Supreme Court of Florida within 60 days after certification of the record; therefore, this case is certified for review by the Supreme Court.

March 28, 1986

JUDGE

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-5-
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Fraud 68,941

IN THE SUPREME COURT OF FLORIDA

GREGORY SCOTT ENGLE,
Appellant,

v. CASE NO. 68,548

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
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ATTORNEY FOR APPELLANT

APPENDIX
E

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TABLE OF CITATIONS
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IN THE SUPREME COURT OF FLORIDA

GREGORY SCOTT ENGLE.	:	
Appellant,	:	
v.	:	CASE NO. 68,548
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant, GREGORY SCOTT ENGLE, was the defendant in the trial court, and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecution, and will be referred to as the state. The record on appeal (from the original appeal, case no. 57,708) will be referred to by use of the symbol "R". The transcript of the trial, the penalty proceeding before the jury, and the original sentencing hearing will be referred to by use of the symbol "T". The record on appeal with reference to resentencing (case no. 68,548) will be referred to by use of the symbol "SR". The transcript of the resentencing proceedings will be referred to by use of the symbol "ST". All emphasis is supplied unless the contrary is indicated.

II STATEMENT OF THE CASE

Gregory Scott Engle, along with Rufus Stevens, was charged by indictment returned April 5, 1979 with first degree murder of Eleanor Kathy Tolin (R 6-7). Appellant moved to sever his trial from that of Stevens (R 25). This motion was granted (R 36).

Appellant's case proceeded to trial before Circuit Judge John E. Santora, Jr. and a jury. The jury was selected and sworn on May 29, 1979. The evidentiary phase of the trial commenced on May 30, 1979 and continued through the following day. On June 1, 1979, the jury heard the closing arguments of counsel and the court's instructions on the law, and then retired to deliberate at 4:53 p.m. (T 968). At 7:00 p.m. the jury returned with three questions, phrased as follows:

> No. 1 - Testimony of Nathan - We would like to see his testimony in which he said to the effect: "I know he (or they) killed her."
>
> No. 2 - In order to prove first degree murder, must we be convinced that the defendant killed the victim?
>
> No. 3 - We do not now need Nathan's testimony. We do need the judge's definition previously requested.

(T 972, see SR 73).

The trial court reinstructed the jury on the degrees of murder and on principals (T 972-76). He asked the foreman of the jury whether that answered their question; the foreman replied "Can we confer on it, Your Honor?" (T 976). Five minutes later, the jury buzzed again (T 976). The trial court said to counsel:

> Apparently, we didn't -- I didn't answer their question because this question reads: Do we have to be convinced the defendant personally killed the victim to render a [verdict] of murder in the first degree? That is the same question they asked before.

(T 976, see SR 73).

The trial court again referred the jury to the written instructions which they had in the jury room (T 979).

At 8:51 p.m., the jury buzzed again and informed the trial court that they were not close to a verdict, and needed to get something to eat (T 981). With the assent of counsel, the trial court permitted the jury to recess for the night (T 983). At 8:30 the following morning, the jury reconvened (T 984). After an hour, the jury asked to be provided with an easel and chalk, and this was done (T 984, see SR 73). Finally, at 10:58 a.m., after nearly six hours of deliberations, the jury

returned a verdict finding appellant guilty as charged of first degree murder (R 91, T 984-86).

The penalty phase of the trial commenced within minutes after the guilty verdict was announced (T 986-87). No additional evidence was presented by either the state or the defense. Rather, the cause was submitted based upon the arguments of counsel and the instructions of the court. The jury was specifically instructed that it was to base its penalty verdict "upon the evidence which you have heard while trying the guilt or innocence of the defendant, and evidence which has been presented to you in the proceedings" (T 1023). After 25 minutes of deliberation, the jury returned a recommendation that appellant be sentenced to life imprisonment (R 91A, T 1028, 1031).

On August 17, 1979, the trial court rejected the jury's life recommendation, and sentenced appellant to death (R 113, T 1091). The trial court's findings in support of the death penalty were read in open court and filed (R 114-19, 1083-92). Included in the sentencing order is a recitation of the trial court's view of the facts of the crime (R 114-15, 116-17). Many of the purported facts referred to by the trial court, however, were not based on any evidence presented in appellant's trial. Rather, their source was statements made by Rufus Stevens which were admitted into evidence at Stevens' trial, in which Judge Santora had also presided (see SR 82-83). [Defense counsel had objected unsuccessfully to the trial court's consideration of Stevens' statements, on the ground that it would deprive appellant of his constitutional right to confront and cross-examine witnesses against him]. In the sentencing order, the trial court found four aggravating circumstances, found no mitigating circumstances, and made no reference to the jury's recommendation of life imprisonment (R 114-119, T 1083-92).

On appeal, appellant raised five issues with respect to the guilt or innocence phase of the trial. With regard to penalty, appellant contended that the trial court's

decision to reject the jury's life recommendation and to impose a death sentence in its stead was improper [see Initial Brief of Appellant, case no. 57,708, p. 49-61], and that the trial court, in so sentencing appellant, improperly considered "evidence" derived from the un-cross-examined statements of Rufus Stevens [see Initial Brief of Appellant, p. 62-67]. The state, in its answer brief, conceded that the trial court considered Stevens' statements in deciding to override the jury's life recommendation [see Brief of Appellee, p.32], but took the position that there was nothing improper about doing so. With regard to appellant's argument that there was a reasonable basis for the jury's recommendation of life, the state asserted that it was "rather clear that the jury recommended life because they had no evidence that appellant participated in the acutal homicide" [Brief of Appellee, p.29]. The state then argued, specifically referring to Issue VII (concerning Rufus Stevens' statements) that "[t]he trial judge, however, did have such evidence ... and relied upon that evidence in imposing the sentence of death" [Brief of Appellee, p.29]. Therefore, the state submitted "if this Court finds the trial judge could properly consider the evidence which proved that appellant was a co-participant in the homicide", then the life recommendation would be unreasonable and the death sentence should be affirmed. [Brief of Appellee p. 29].

The state further argued that Stevens' un-cross-examined statements were reliable, because they contained admissions against his penal interest [Brief of Appellee, p. 35], while appellant, citing Bruton v. United States, 391 U.S. 123 (1968), countered that the statements were inherently unreliable, because of the "recognized motivation [of an accomplice] to shift blame onto others", and that the unreliability of such evidence is compounded when it cannot be tested by cross-examination [Reply Brief of Appellant, p.17].

On September 15, 1983, this Court affirmed appellant's conviction, but agreed with his contention that, in imposing the death sentence, the trial court improperly considered Rufus Stevens' statements, in violation of appellant's sixth amendment

right of confrontation. Engle v. State, 438 So.2d 803 (Fla. 1983). Consequently, this Court vacated appellant's death sentence, and remanded with instructions to the trial court to conduct another sentencing hearing. Engle v. State, supra, at 814.

The resentencing hearing was held on October 4, 1984. At the outset, Judge Santora denied appellant's request that he recuse himself (SR 60-61, ST 10-15). Appellant presented additional evidence in mitigation, consisting of the testimony of his mother, Florence Engle; his sister, Peggy Jo Pugh; and (upon the state's stipulation to its admissibility) a written psychological evaluation by Dr. James Vallely (ST 16-32, SR 75-78). Also before the court, from the original sentencing proceeding in 1979, were the pre-sentence investigation report, and psychological evaluations by Drs. Ernest Miller and Lauren Yates (SR 42-59). After hearing the arguments of counsel (ST 33-69), the trial court deferred imposition of sentence (ST 69-71).

Appellant submitted a memorandum of law (followed by four supplemental memoranda) in support of his position that there was a reasonable basis for the jury's life recommendation, and that (especially now, in the absence of the contrary "evidence" derived from Rufus Stevens' statements) it should be followed (SR 66-74, 180-191). Included in the memorandum was a brief biographical sketch of each juror, and a summary of his or her responses when asked under oath whether he or she could recommend the death penalty if the circumstances warranted it (SR 69-72). Defense counsel emphasized the questions submitted by the jury during their lengthy guilt-phase deliberations concerning whether, in order to return a verdict of first-degree murder, they had to be convinced that appellant personally killed the victim (SR 73). Defense counsel also focused on the testimony of the key state witness at trial, Nathan Hamilton (SR 73-74), and on the defense's closing argument in the penalty phase (SR 73).

The state also filed a memorandum of law, in which it argued for re-imposition of the death penalty (SR 81-103). It was the state's position that there were four aggravating and no mitigating circumstances, that the jury's recommendation was

unreasonable, and that death was the only appropriate sentence (SR 83-103). At the beginning of its memorandum, the state set forth those portions of the factual recitation in the trial court's original sentencing order which "must have emanated from Stevens' confession" and which therefore could no longer be considered (SR 82-83). The state conceded in its memorandum that appellant was entitled to present, and the court was obliged to consider, additional evidence in mitigation at the resentencing hearing (SR 83). Appended to the state's memorandum was a transcript of the testimony of Nathan Hamilton (SR 86, 105-178).

On March 28, 1986, the trial court again sentenced appellant to death (SR 204, 206-208, ST 74-78). The court prefaced his sentencing order with the following comment:

> Pursuant to the order by the Florida Supreme Court this court held an evidentiary hearing and both the State and the defendant were allowed to present evidence. In resentencing this defendant the court has reassessed all aggravating and mitigating circumstances without taking into consideration inadmissible statements made by Rufus Stevens. Additionally, the court has thoroughly studied the record in this case and considered all arguments by counsel for both the State and the defense.
>
> Evidence produced at trial established that the victim, Kathy Tolin, a young mother of two children, was working as a clerk in a convenience store. Tolin was robbed, abducted, raped, mutilated, and then murdered. This court finds that the evidence presented at trial conclusively establishes that Gregory Engle was an active participant in all phases of this crime and at least contemplated that lethal force be used and finds that the only appropriate sentence is death...

(SR 206).

The trial court found four aggravating circumstances: (1) that the murder occurred in the course of a robbery, kidnapping, and sexual battery; (2) that it was committed to avoid lawful arrest; (3) that it was committed for pecuniary gain; and (4) that it was especially heinous, atrocious, or cruel (SR 206-08). The sentencing order does not discuss any specific statutory or non-statutory mitigating circumstances, but only the conclusory statement "The Court finds that there are no mitigating circumstances" (SR 208). There is no reference in the sentencing order

to the jury's life recommendation, except perhaps for the judge's statement that he had "... considered all arguments by counsel for both the State and the defense" (SR 206).

Notice of appeal was filed on April 2, 1986 (SR 216).

III STATEMENT OF THE FACTS

A. The Trial

The following is a summary of the evidence presented at trial on May 30-31, 1979:

On March 12, 1979, at 9:30 p.m., Eleanor Kathy Tolin arrived for work as a cashier at the Majik Market on Timuquana and Catoma Roads in Jacksonville (T 296-297). When Mrs. Tolin relieved the afternoon cashier, $50 was left in the cash register (T 296-299). At approximately 3:50 a.m. on March 13, 1979, Walter Glenn Thomas purchased a pack of gum from Mrs. Tolin at the Majik Market (T 300-302). David Glover, a newspaper deliveryman for the Florida Times Union, arrived at the Majik Market around 4:20 a.m. on March 13, 1979 (T 302-303). Glover found the store unlocked and unattended. He called the police and stayed until they arrived (T 304). A subsequent comparison between the cash on hand and the cash register record showed $67 was missing from the store (T 308).

On March 14, 1979, at approximately 10:00 a.m., Mrs. Tolin's body was found in a wooded area of Fouraker Road (T 316, 319-21, 327, 348-50, 352-53). An autopsy was performed at the Medical Examiner's Office by Dr. Bonifacio Floro (R 371-72). Dr. Floro determined that the cause of death was ligature strangulation and multiple stab wounds of the back, "... whether singular or in combination" (T 372). He believed that the strangulation injuries occurred first, and would have been fatal irrespective of any of the stab wounds (T 372-73, 384). Dr. Floro found a four inch laceration of the vaginal area, which he believed could have been caused by a large object, or by forcible intercourse (T 359-60, 369-70). No semen was discovered in the vaginal area (T 381). Dr. Floro testified that he could not tell whether Mrs. Tolin's injuries

were inflicted by one person or by more than one person (T 381).

Officer Raymond A. Godbee of the Jacksonville Sheriff's Office was patrolling Zone I during the 3:00 p.m. to 11:00 p.m. shift on March 19, 1979 (T 388-389). He had occasion to stop an automobile which had three occupants (T 389). The driver was Lanny Israel, the passenger in the right front seat was Ralph Coble and the passenger in the back seat was Nathan Hamilton (T 390). Israel told Godbee that Hamilton knew who was involved in the Timuquana Road Majik Market robbery murder case (T 393). As a result of this conversation, both Israel and Hamilton were taken down to the Sheriff's homicide office for questioning (T 393; 391).

At approximately 11:25 p.m. on March 19, 1979, Investigator J.L. Parmenter, a homicide detective, had a 45 minute talk with Nathan Hamilton in a conference room in the Police Memorial Building (T 590-91). Parmenter, Detective Zipperer, and Hamilton then went to Hamilton's trailer to get Hamilton's wife and baby and bring them to the homicide office (T 592). While at the trailer, Parmenter encountered Gordon Day, Guy Custer, and Rufus Stevens. Parmenter gave them a "cover story" (that he had arrested Nathan Hamilton for drugs) in order to conceal his actual investigation of the Majik Market homicide (T 592-93). After gaining information from Hamilton and securing his family, Parmenter and other officers arrested Rufus Stevens and appellant for murder (T 550-51, 570, 594-96, 632-33).

Subsequent to his arrest, appellant was interviewed by Detectives Zipperer and Parmenter and Lieutenant Suber (T 562-66, 597-601, 608-13, 665-67). He denied taking part in the robbery of the Majik Market (T 567-68). In response to questioning about his whereabouts on March 13 from 2:00 a.m. until daybreak, appellant stated that when he got off work at the steak house he went to his residence (he was staying with the Wemmer family) and knocked on the door. No one came to the door so he sat on the porch. Shortly thereafter Rufus Stevens and Nathan Hamilton came by and asked him if he wanted to go for a ride. He rode around Jacksonville in Stevens' car with Stevens and Hamilton until a little after 2:00 a.m. when they

took Hamilton home, and then he continued to ride around drinking beer with Stevens until just after daylight (T 565-568). He never told the officers of any particular place he went with Stevens nor did he tell them of any particular person they saw during their ride (T 567).

During the interview, Detective Parmenter showed appellant a Buck pocket knife engraved with the initials S.E. (T 611-13). Appellant told Parmenter that it looked like his knife, and that he had had his initials put on his knife at the Trophy Shop on Cassat Avenue about two months earlier (T 612-13).

Nathan Hamilton was the state's key witness at trial (T 397-471). Hamilton had known Rufus Stevens for six years; Stevens is his wife's first cousin (T 398, 425). They lived in the same trailer park (T 399). Hamilton and Stevens were good friends; they "went fishing together, drank together, whatever friends do together" (T 425). Sometimes, Hamilton acknowledged, he and Stevens did things that were against the law together (T 425). Hamilton had known appellant for about seven or eight years (T 405). Appellant had been living with Hamilton and his wife in their trailer, but about three or four weeks prior to March 12-13, 1979, they had asked him to leave (T 444).

On Monday night, March 12, 1979, beginning at about 8:00 p.m., Nathan Hamilton and Rufus Stevens were drinking together (T 398-99). They hit about five different bars (T 399-400). Stevens was driving (T 401, 404). At about 10:00 p.m., Stevens started discussing a robbery (T 427). He asked Hamilton if he wanted to come with him and rob the Best Western Motel in Orange Park (T 428, 430). Hamilton told Stevens to let him think about it for a while, it was "a little out of [his] league" (T 428, 430). After first broaching the subject, Stevens continued to talk about robbing the Best Western (T 430). Hamilton figured the drunker Stevens got, he'd forget about it (T 430).

Shortly before 12:30 a.m., Stevens and Hamilton stopped at the Majik Market

on the corner of Catoma and Timuquana for a cup of coffee (T 400, 431-32). Kay Tolin was working there at the time (T 432). As they got back in the car and were leaving, Stevens said to Hamilton that they had just left the best place to rob (T 431). Stevens asked him if he wanted to rob the Majik Market (T 430). Hamilton replied that he thought Stevens was crazy because the lady could identify both of them; they both lived in that neighborhood and everybody around there could identify them (T 432). Rufus Stevens said they would take her out of the store, to get her away from the phone (T 433, 463-64).

Nathan Hamilton testified that it was his understanding that, if he had agreed to do it, the robbery of the Majik Market was to occur immediately (T 433-34). According to Hamilton, Rufus Stevens was ready, willing, and able to commit the robbery right then, if he [Hamilton] had acquiesced to the plan (T 434, 459-60). This was true even though, as far as Hamilton knew, Stevens did not have a weapon (T 459-60).

About an hour to an hour and a half later, Stevens and Hamilton picked up appellant, who was sitting on the Wemmers' front porch (T 401, 403, 434). Appellant got in the back seat of the car; Stevens was still driving and Hamilton was on the passenger side of the front seat (T 403-04). At this point, Hamilton had had about fifteen draft beers (T 404, 428-30). Rufus Stevens asked appellant if he wanted to make some money (T 403, 427, 435). Appellant said sure, what do I have to do (T 403, 435). Stevens said rob a Majik Market, and appellant again said sure (T 403, 427, 435). There was no more conversation after that (T 403). Hamilton remained in the car for about two more minutes, before they dropped him off at his trailer (T 403, 438).

[The prosecutor showed Nathan Hamilton a knife; Hamilton recognized it, from the initials, as appellant's knife (T 405, 422). Hamilton was with appellant when he had it inscribed (T 405). Hamilton stated that he'd never seen appellant without the knife, though he also stated that he [Hamilton] had had appellant's knife in

his possession a few times, all prior to the night of the Majik Market robbery (T 405, 465). About a week after appellant and Stevens were arrested, Hamilton obtained a knife which was similar to appellant's, only bigger (T 465-66)].

During the daytime on March 13, 1979, as Hamilton was watching television with Rufus Stevens, they saw a newscast concerning the robbery at the Majik Market (T 439). Stevens said "[T]hat's the robbery that my wife thinks that I did" (T 439). Hamilton knew he had done it (T 439).

On March 17, 1979, Rufus Stevens told Hamilton that "we got to get rid of Scott's [appellant's] knife because that's what it was done with" (T 440). The next evening, according to Stevens' directions, Hamilton tried to get the knife from appellant (T 440). Hamilton and appellant were watching "Zorro" on the late movie, and smoking a couple of joints, at Hamilton's trailer (T 408-10, 420, 438, 442-43). Hamilton told appellant that Rufus Stevens had told him that appellant's knife is what it was done with (T 411, 416, 421). Appellant tossed the knife to Hamilton and asked him if he saw any blood on it (T 411, 416, 421, 441). Hamilton looked at it closely, did not see anything on it, and handed it back to appellant (T 411, 416, 421, 441). Hamilton then tried to trade knives with appellant, but appellant wouldn't trade[1] (T 411, 416, 421, 441). Hamilton testified that if he had gotten appellant's knife, he would have given it to Rufus Stevens (T 411, 441).

During this conversation, Hamilton asked appellant if he thought it was worth a lousy fifty or sixty dollar robbery to take a girl out of a store and kill her, and appellant answered no, he didn't (T 416-17, 421, 442). Hamilton asked him why they did it (T 421). Appellant said they got her out of the store away from a telephone, and Rufus Stevens went crazy and started saying she's going to identify us, she's going to identify us (T 417, 421). According to Hamilton, he and appellant

[1] It is not entirely clear what knife Hamilton proposed to trade, since he testified that he did not acquire his own knife until after appellant and Stevens were arrested (T 465-66). According to Marsha Wemmer, she had seen Nathan Hamilton with a knife that looked like appellant's, but she was not sure when (T 491).

had the exact same conversation again the next day, while they were walking down to the Lil' Champ store (T 418, 423-24, 442-43).

Nathan Hamilton testified that he did not at any time go to the police voluntarily with what he knew (T 424). He explained this by saying "Sir, in the county where I was raised, I was taught all my life that you don't turn in a relative for no reason" (T 470). Hamilton stated that his relative is Rufus Stevens (T 470).

Hamilton first came in contact with the police on the Monday a week after the robbery (March 19, 1979), when he was riding around in a car, and drinking, with a friend, Lanny Israel (T 424). Hamilton had told Israel that he knew who had done the robbery and murder, but had not told him who it was (T 424, 444-45). When they were stopped for DWI, Israel (who was driving) told the police that Hamilton knew something about the case, and "the next thing I knew, I was at homicide" (T 424, 445). At the police station, Hamilton was advised of his constitutional rights by Detective Parmenter (T 446-48). Although he had been told he was not a suspect, Hamilton was concerned about going to jail, because "... when I go to a police station, I usually go to jail, yes" (T 446,449-50).

Hamilton initially told the police what he knew about the crime by referring to the perpetrators as "A" and "B" (T 453, 455). [Hamilton claimed not to be afraid of anyone, but he was concerned for his wife and baby, and did not want to name names until the police secured them (T 451-52)]. "A" referred to appellant, and "B" referred to Stevens (T 455, 457). Hamilton drew a diagram, with the words "easy", easy", and "weapon" written next to "A" (appellant) and with the words "hard", "killing", and "car" written next to "B" (Stevens) (T 455-57, 459). Hamilton explained that he thought appellant would be easy to "break", or to get to talk, while Stevens would be more difficult (T 455-56, 459). The reference to "killing"

was because Hamilton thought Rufus Stevens might had done the killing[2] (T 457). From knowing them and having lived with them, Hamilton considered Stevens to be the tougher and more dominant one of the two (T 456).

After his wife and child were placed in a motel, Hamilton told the police the names of "A" and "B" (T 461). Appellant and Stevens were arrested that night or later that morning (T 462).

At the time the crime was committed, appellant was living with James and Marsha Wemmer at 6355 Catoma Street (T 472-74, 525-26). Marsha Wemmer testified that on Monday morning, March 12, 1979, appellant, to the best of her recollection, had no money (T 474, 477, 485). Appellant called her that night and said he wouldn't be in until 1:00 or 1:30; she told him she would leave the door unlocked, but she changed her mind and didn't (T 485). The next morning, as she was letting the dog out, she saw appellant as he came in the door (T 475). Appellant told her that he had been out from about 4:00 a.m. drinking beer with Rufus Stevens (T 475-476). About a half an hour after he got in, Mrs. Wemmer saw appellant counting out a few bills. He told her Rufus Stevens had given him $20 and that he was not to say anything to Stevens' wife because she might get upset (T 476).

Mrs. Wemmer testified that appellant owned a knife which he carried with him most of the time, but as far as she knew he left the knife at home when he went to work (T 479). After she told appellant she had heard on the news that the girl from the Majik Market had been found stabbed, appellant told her he had misplaced his knife (T 477-78, 479-80). However, at some point prior to his arrest, appellant had the knife again, and at that time made no effort to conceal or hide

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[2] Detective Parmenter testified that Hamilton told him that "B" (Stevens) had killed the woman (T 635). He also testified that he already knew the first names, Scott and Rufus, from Lanny Israel (T 641-43).

it (T 486). Mrs. Wemmer testified that State's Exhibit N for identification looked like appellant's knife (T 480). She had seen Nathan Hamilton with a knife that looked like appellant's, but she was not sure when (T 491).

After encountering police officers at Nathan Hamilton's trailer in the early afternoon of March 20, 1979, Rufus Stevens, Gordon Day (a cousin of Stevens and a brother-in-law of Hamilton), and Guy Custer (Day's roommate) went to the Wemmers' residence (T 481, 494, 497-98, 516, 527, 592-93). The Wemmers, Day, and Custer all testified to a conversation that occurred between Rufus Stevens and appellant. According to Marsha Wemmer, Stevens told appellant that Nathan Hamilton might be turning them in for the murder of the store clerk (T 481-83, 487). There seemed to be a "general understanding" that they should run (T 487-88). Appellant said he didn't have anything to hide or anything to run for, so he didn't think he should run (T 483, 488). According to Day, before they got to the Wemmers' house, Rufus Stevens had said he was going to kill the son of a bitch (Nathan Hamilton) for running his mouth (T 505-06). When they got to the Wemmers', Stevens told appellant that the police were over at Nathan's house, that Nathan was going to run his mouth, and "we got to get out of here and run" (T 499, 502, 507). Appellant replied that there was nothing to worry about, they couldn't prove a damn thing on him (T 500, 507). According to Custer, Stevens told appellant that Hamilton was "going to pin it on him", and they had to get out of town; appellant said they couldn't prove anything so he was just going to go back to sleep (T 517). According to James Wemmer, Rufus Stevens was acting like he wanted to take off (T 537). Appellant went to get his coat like he was going to leave with them; but then stopped, said he had nothing to run from and nothing to hide, and put his coat back down (T 534, 536). Gordon Day testified that appellant rode around with them for a while after that; he did not know whether appellant went back to bed after they parted company (T 508).

James Wemmer testified that about 15-20 minutes after Stevens, Day, and Custer left his house, appellant said they should hide his [appellant's] knife and their marijuana (T 526-28). The marijuana was in an opaque Tupperware container (T 527, 529). After talking with his wife, Wemmer hid the marijuana under the house (T 529). He did not hide appellant's knife (T 529). This occurred before the police arrived to arrest appellant (T 531). Later that day, Gordon Day came to Wemmer's house and asked him where appellant's knife was (T 532; 540-541). Wemmer thought that the knife might be under the house; he found it in the "stash box" and gave it to Day (T 532-533; 541-542). Wemmer did not see appellant put it there (T 535). Gordon Day testified that when he got the knife from Jim Wemmer, he didn't really know what he intended to do with it; someone had mentioned throwing it away (T 541-53). Day kept the knife for about half an hour and then turned it over to a police officer (T 509, 542-543).

In testimony similar to that of his wife, James Wemmer recalled that after the media reports of the Majik Market crime, appellant mentioned that he had lost his knife (T 533-35). However, between that time and his arrest, appellant was back in possession of the knife (T 533-35).

The physical evidence and pertinent testimony about that evidence was as follows: Mrs. Tolin had type A blood (T 735-36, 740); the codefendant, Rufus Stevens, had type O blood (T 736, 740-41); appellant had type O blood (T 737, 741); type A bloodstains were found in the trunk of Rufus Stevens' car, and on the trunk latch mechanism (T 405-08, 677-78, 681, 719-20, 737-40); type A bloodstains were found on the Buck pocket knife identified as belonging to appellant (T 404-05, 529, 541, 741-45); the pocket knife was consistent with the stab wounds in the victim's back, and could have caused those wounds (T 721-22, 726); the trunk latch mechanism from Stevens' car could have caused an injury mark on the victim's left thigh (T 718-20, 725); a kitchen knife found under Rufus Stevens' former house trailer could

have caused a mark on the victim's back below the three stab wounds (T 619-25, 716-18, 724); two dried semen stains of undetermined origin were found on the back seat of Rufus Stevens' car (T 732-34, 748); hair found on the back seat and floorboard of Stevens' car, and on certain articles of the victim's clothing, likely came from the victim (T 405-08, 677-79, 687, 701-15).

Following the closing arguments of counsel and the court's instructions on the law, the jury retired to deliberate at 4:53 p.m. (T 968). At 7:00 p.m., the jury returned with three questions:

> No. 1 - Testimony of Nathan - We would like to see his testimony in which he said to the effect: "I know he (or they) killed her."
>
> No. 2 - In order to prove first degree murder, must we be convinced that the defendant killed the victim?
>
> No. 3 - We do not now need Nathan's testimony. We do need the judge's definition previously requested.

(T 972, see SR 73).

The trial court reinstructed the jury on the degrees of murder and on principals (T 972-76). He asked the foreman of the jury whether that answered their question; the foreman replied "Can we confer on it, Your Honor?" (T 976). Five minutes later, the jury buzzed again (T 976). The trial court said to counsel:

> Apparently, we didn't -- I didn't answer their question because this question reads: Do we have to be convinced the defendant personally killed the victim to render a [verdict] of murder in the first degree? That is the same question they asked before.

(T 976, see Sr 73).

The trial court referred the jury to the written instructions which they had in the jury room (T 979).

At 8:51 p.m., the jury buzzed again and informed the trial court that they were not close to a verdict, and needed to get something to eat (T 981). With the assent of counsel, the trial court permitted the jury to recess for the night (T 983).

At 8:30 the following morning, the jury reconvened (T 984). After an hour, the jury asked to be provided with an easel and chalk, and this was done (T 984, see SR 73). Finally, at 10:58 a.m., after nearly six hours of deliberations, the jury returned a verdict finding appellant guilty as charged of first degree murder (R 91, T 984-86).

The penalty phase of the trial commenced within minutes after the guilty verdict was announced (T 986-87). No additional evidence was presented by either the state or the defense. Rather, the cause was submitted based upon the arguments of counsel and the instructions of the court. The jury was specifically instructed that it was to base its penalty verdict "upon the evidence which you have heard while trying the guilt or innocence of the defendant, and evidence which has been presented to you in the proceedings" (T 1023). After 25 minutes of deliberation, the jury returned a recommendation that appellant be sentenced to life imprisonment (R 91A, T 1028, 1031).

On August 17, 1979, the trial court, after consideration of statements made by Rufus Stevens (which were admitted into evidence at Stevens' trial, but not at appellant's) (see Statement of the Case, infra, P. 3-5), rejected the jury's life recommendation and sentenced appellant to death (R 113, T 1091).

B. The Resentencing Proceeding

In addition to the evidence presented at trial in May 1979, and the jury's recommendation of life, the matters before the trial court upon resentencing included the testimony, introduced at the hearing of October 4, 1984, of appellant's mother, Florence Engle, and his sister, Peggy Jo Pugh (ST 19-32). Also introduced into evidence at that time, upon the state's stipulation to its admissibility, was a psychiatric evaluation of appellant conducted by Dr. James Valleli (SR 75-78, ST 16-18). The presentence investigation report submitted prior to the original sentencing proceeding, and psychological evaluations performed at that time by Drs. Ernest Miller and Lauren Yates, were also available to the court (SR 42-59).

Florence Engle testified that she is the mother of five children; Scott (appellant) is the middle child (ST 19-20). When Scott was born, he had trouble breathing and was placed in an incubator (ST 20). He was sickly as a child, and "it seemed as he grew older his playmates that he chose were younger than him" (ST 20). Although he was older than the other kids, he was always a follower, rather than a leader (ST 25).

Mrs. Engle's husband was "shell shocked" in World War II, and was hospitalized for a year after the service, undergoing insulin shock treatments (ST 21). Thereafter, he suffered poor health, and mental and emotional problems (ST 21-23). He began having heart attacks when Scott was about 10 or 12, and his mental condition deteriorated from there (ST 21). That was about the time, Mrs. Engle testified, that she started having trouble with Scott (ST 21). Her husband "spent most of his time in the hospital or going back and forth to the hospital", while she had to work from three to eleven, and had nobody else to help her take care of the children (ST 22). Mrs. Engle testified:

> Well, after he started having heart attacks, of course, the mental problems got worse, and one of his heart attacks he had to have his leg amputated. My husband was a handsome, vain man and a lady's man, and he knew that his time, you know, wasn't long and he couldn't accept his condition, and by that time I had the two smaller children and he panicked and moved us out of our nice home into a cement block house with no furnace, cold running water and no bathroom. We like to froze to death that first winter.
>
> That's when -- well, that's when he lost his leg, and I lost another baby and my mother had her stroke, you know. It was just a series of things like that, and that's when the work back in those days in the hospital was very hard, you know, and I hadn't worked in 15 years and I tried to work, cook and clean for seven people and maybe two or three times a week I would run him to the hospital, you know, and then there was that leg off and I knew that he was making it hard on the older children.
>
> See, the two little [ones] were in diapers, and I knew he was making it hard on them, but I didn't realize how hard until they came to me and told me some of the things, you know, how mean he was to them.

* * *

> So the three older children came to me. By this time my older son had a job outside the home. He was still in school, but he stayed away as much as possible, and Peggy came to me and Gary told me some of the things that the -- the meaness of their father, and so I went to the hospital and spoke to the head of the nursing association and I explained the situation.
>
> I said you know me, what I can do. I need my job and she said, well, put you on midnights immediately. That will have you at home at -- all the time except during the night, except when he is asleep, and that's what they did, and I stayed on midnights until my husband expired.

(ST 23-24).

Asked what kinds of trouble she began to have with Scott, Mrs. Engle replied:

> Well, so much as happened that I am not clear, you know. I blocked things out. I have had to in order, you know, to stand a lot of things. I remember he ran away once and then later on when we moved back up on Ohio Avenue he and another friend set fire to a -- some [hay?] outside a grocery store, you know, things like that.

(ST 22).

After that incident, "theylet him off to join the service, and he was in Korea and then he came, you know, came back from Korea (T 22).

Mrs. Engle testified that while Scott was living at home he was very mild; his sister Peggy "always had to fight his fights" (T 24). Mrs. Engle testified that she loves her son (T 25).

On cross-examination, Mrs. Engle stated that she held Scott back in the first grade because he was so immature and sickly (T 26). He went to school through the 10th grade, as far as Mrs. Engle could recall, and then went into the Army (T 26).

Peggy Jo Pugh testified that she is 14 months older than her brother Scott Engle (ST 28). Their family was not a close one; their father was always sick, and their mother tried to cope with five children, and her husband's illness (ST 29). Their father "was always screaming and hollering, and if we got out of the way,

anything, turn the T.V. up too loud, go through a room too much, we always got beat for it. I mean, he always punished us" (ST 29). Peggy got married at age 16 in order to get away from home (ST 30). After her father died she wanted to come back, but she couldn't (ST 30). She testified that Scott "always ran with younger boys, but if -- I always protected him. I felt that if anything came up then I would stand up for him" (ST 30).

According to the psychiatric evaluation report prepared by Dr. Yates, appellant stated that he was raised in Middletown, Ohio (SR 47).

> The elder Mr. Engle is described as a disabled war veteran with a leg amputation. He is asserted to have been alcoholic, with psychiatric problems, and who frequently beat his son. Mr. Engle [appellant] asserts that he could never measure up to his father's expectations of him, and that his father has lowered an automobile hood upon his neck, and beat him while asleep with canes, bricks, and scalding coffee. The elder Mr. Engle was deceased December 31, 1969, and according to [appellant], "I don't celebrate Christmas because of it." His mother is described as "nice" because she did not beat her son....

(SR 47).

Based on her interview with appellant, Dr. Yates reported that appellant began setting fires at pre-school age, when he used his teddy bear to ignite his home (SR 48). Appellant "state[d] that he was accused of arson in 54 instances over some period of time" (SR 48). He would call the fire department after each incident and watch them attempt to put the fire out (SR 48). According to appellant, no person was injured, except for one sprain to a fireman (SR 48). Appellant told Dr. Yates that he ran away from home on three occasions, and was finally permitted to reside periodically with friends (SR 48). Appellant "report[ed] that he quit school in the tenth grade and joined the army as a missile expert" (SR 48). Appellant's "earliest stated recollection of involvement with drugs dates back to seven years of age for marijuana and beer" (SR 48). He claimed to have been hospitalized for drug addiction two or three times while in the service (SR 48). According to Dr. Yates report,

"[d]rug and alcohol use is reported to the extent of maximal intoxication when available" (SR 48).

According to Dr. Miller, appellant "does not suggest a psychotic state of mind" (SR 45). Dr. Miller saw no psychiatric evidence that appellant suffered any significant impairment of his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law (SR 45). Nor, in Dr. Miller's opinion, did appellant appear to be "particularly vulnerable to the dominations or duresses which might be imposed by other persons, particularly as it reflects on his actions in the alleged crime" (SR 45).

According to Dr. Vallely's evaluation, appellant reported having been "knocked unconscious for an unstated period of time at 9 years when hit in the head with a brick" (SR 76). Subsequently, appellant "was involved in numerous car wrecks and reports instances of being unconscious" (SR 76). Appellant reported drug and alcohol related blackouts, and chronic headaches over the last ten years (SR 76). However, there was no report of any seizures or convulsions, and no head trauma since his imprisonment (SR 76). After administering a battery of psychological and neuropsychological tests (see Sr 75), Dr. Vallely concluded that appellant "clearly has a diminished capacity for controlling impulses, anticipating consequences, and utilizing past experience to guide ongoing behavior" (SR 78). Dr. Vallely further stated "This pattern is consistent with the findings of Frontal Lobe dysfunction which appears to represent a chronic condition of life long duration" (SR 78).

The pre-sentence investigation revealed only one prior criminal conviction as an adult. Appellant pled guilty to a charge of arson in Middletown, Ohio in 1974, and received a 1-5 year prison sentence (SR 56). After three months, the sentence was suspended, and appellant was placed on five years "shock" probation (SR 56). The charge involved a warehouse fire; investigation by the Middletown police indicated that the fire was started by appellant (then age 20) and three juveniles (SR 56).

Appellant's juvenile record consisted of charges of breaking and entering, attempted uttering and passing stolen checks, larceny, and arson (SR 56). The PSI, quoting from the records of Ohio authorities, states "Pertaining to the Arson charge of 5-28-71, it should be noted that the defendant did not set the fire but had been with the person who did and eventually left prior to the fire being set" (SR 56).

The PSI contains a narrative account of the circumstances of the Majik Market robbery-murder, as derived from the files of the Jacksonville Sheriff's Office (SR 51-55). According to this account, after the police had secured Nathaniel [Nathan] Hamilton's wife and baby, Hamilton gave Detective Parmenter the names of the suspects. "Nathaniel Hamilton stated that the suspects' names were Scott Engle and Rufus Stevens and that Rufus Stevens was a first cousin to his wife and that Rufus Stevens had done the killing with Scott's knife" (SR 54).

IV SUMMARY OF ARGUMENT

The jury recommended that appellant be sentenced to life imprisonment because it believed from the evidence that appellant's degree of participation in the crime was significantly less than that of Rufus Stevens. The jury could reasonably have determined from the evidence - and particularly from the testimony of the state's key witness Nathan Hamilton - that Stevens was the leader and appellant the follower; that Stevens planned the robbery of the Majik Market and the abduction of the clerk over an hour before he recruited appellant to assist him; that when appellant agreed to help Stevens rob the store, he did not know that Stevens intended to abduct the clerk; that after the robbery Stevens "went crazy" and killed the victim to avoid identification; and that appellant's role was essentially that of an aider and abetter. The jury's life recommendation was reasonable and should be given effect. See Barclay v. State, 470 So.2d 691, 695 (Fla. 1985); Hawkins v. State, 436 So.2d 44 (Fla. 1983); Woods v. State, ___ So.2d ___ (Fla. 1986) (case no. 64,509, opinion filed April 24, 1986) (11 F.L.W. 191, 192).

V ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY REJECTING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND BY IMPOSING THE DEATH PENALTY UPON APPELLANT.

The main issue in this appeal is whether there existed a reasonable basis for the jury's recommendation of life - if there was, Florida law requires that the jury's recommendation be given effect. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982); Cannady v. State, 427 So.2d 723, 731-32 (Fla. 1983); Hawkins v. State, 436 So.2d 44, 47 (Fla. 1983); Barclay v. State, 470 So.2d 691, 694-95 (Fla. 1985); Huddleston v. State, 475 So.2d 204, 206 (Fla. 1985); Amazon v. State, 487 So.2d 8, 12-13 (Fla. 1986).

In the trial court, in urging Judge Santora to re-impose a sentence of death, the prosecutor took the position that this Court had already approved the override in the original appeal (ST 49-51). In effect, then, the state was asking the trial court merely to go through the motions of deleting any consideration of Rufus Stevens' confession from the sentencing order - the sentencing decision, in the prosecutor's view, was preordained. In anticipation that the state may contend on appeal that the propriety of the "life override" in this case has already been decided, or is "law of the case", appellant will show, before getting into the merits of his argument, that that is not so.

In the original appeal, this Court held that the trial court's consideration of the un-cross-examined statements of Rufus Stevens violated appellant's right of confrontation, vacated the death sentence, and "remanded with instructions to conduct another sentence hearing" Engle v. State, 438 So.2d 803, 814 (Fla. 1983). Where this Court's remand "direct[s] a new sentencing proceeding, not just a reweighing ... both sides may, if they choose, present additional evidence." Mann v. State, 453 So.2d 784, 786 (Fla. 1984). The state conceded, prior to resentencing, that "... the

Court is obliged to consider evidence offered by the defendant at this resentencing hearing in mitigation" (SR 83). Accordingly, appellant presented the testimony of his mother and sister with respect to his childhood and family life (particularly in relationship to his physically disabled and emotionally disturbed father); as well as his trait of being a follower, who needed to be protected by his sister, notwithstanding that he tended to associate with younger boys (ST 19-31). Appellant also presented the psychological evaluation of Dr. Valley, who found that appellant clearly has a diminished capacity for controlling impulses, anticipating consequences, and utilizing past experience to guide his behavior, as a result of Frontal Lobe dysfunction, "which appears to represent a chronic condition of life long duration" (SR 75-78). Consequently, there was more evidence available to the trial court on resentencing than could have been considered at the time of the original sentencing, or the original appeal.

But more importantly (in light of the reason for the jury's life recommendation, and the reason for the original override), there was also less evidence this time around. The evidence which was no longer before the trial court was, of course, the statements made by Rufus Stevens. That improperly considered evidence was the foundation of the trial court's decision to override the jury's life recommendation in the first instance.

In its brief in the original appeal, counsel for the state wrote:

> The only mitigating circumstances offered to the jury in this case was the non-enumerated mitigating circumstance that Appellant was not the actual perpetrator of the homicide-- that Stevens was the actual murderer (TT 1009).
>
> In fact, counsel for this Appellant told the jury that all the aggravating factors applied to Stevens (TT 1011). It is rather clear that the jury recommended life because they had no evidence that Appellant participated in the actual homicide. The trial judge, however, did have such evidence (See: Issue VII)[3] and relied upon that evidence in imposing the sentence of death.

[Brief of Apellee, Case No. 57,708; p.29].

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3 Issue VII in the original brief is the one involving Rufus Stevens' statements.

The state further argued:

> Tedder v. State, supra, and its progney (sic) upon which Appellant relies so heavily are clearly distinguishable for in those cases the trial judge overruled the jury's recommendation of life on the same evidence that was presented to and considered by the jury. This judge, however, had highly relevant information and evidence that the jury did not have, to-wit: that the Appellant was a participant in the actual homicide. (R 116)[4] (See: Dr. Miller's report in Stevens v. State, Case No. 57,738 at R 37). Therefore, his refusal to follow the jury's recommendation was proper, rational and constitutional. Douglas v. State, 328 So.2d 18 (Fla. 1976); Dobbert v. State, 328 So.2d 433 (Fla. 1976); Barclay v. State, 343 So.2d 1266 (Fla. 1977) and Hoy v. State, supra. This Court in Barclay, supra, said:
>
> > ... When there is disagreement between the jury and judge after both have evaluated the same data, we have said that the jury's recommendation should generally prevail.... 343 So.2d at 1266.
> >
> > Obviously where the trial judge has obtained additional information than that possessed by the jury, the Tedder principle is inapplicable.[5] See also: Sawyer v. State, 313 So.2d 680 (Fla. 1975) and Hoy v. State, supra.

[Brief of Appellee, Case No. 57,708; p. 30].

In its argument pertaining to the right of confrontation issue, the state said:

> Appellee concedes, as it must, that the trial judge considered this evidence [Stevens' statements] in deciding to override the jury's recommendation of life imprisonment; however, appellee respectfully submits that there was nothing improper in doing so.

[Brief of Appellee, case no. 57,708; p. 32] [emphasis supplied by appellant].

In view of the foregoing, it is clear that we are dealing with a different override than the one that was at issue in the original appeal. Rufus Stevens' statements - the primary evidence relied on by the state to support the original override - are no longer before the Court, while additional mitigating evidence is before the

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4 Page 116 in the original record is the trial court's original sentencing order, in which he sets forth the "facts" of the crime as derived from Rufus Stevens statements.

5 Appellant, needless to say, does not agree that the Tedder principle is rendered inapplicable merely because the trial court has obtained additional information. See Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983).

Court. The basis for the jury's life recommendation, however, remains the same; they recommended life because (as the state put it) they "had no evidence that Appellant participated in the actual homicide." The jury had heard uncontradicted testimony from the state's key witness, Nathan Hamilton, that it was Rufus Stevens who brought up the subject of a robbery; it was Stevens who (accompanied only by Hamilton) went into the Majik Market for a cup of coffee while Mrs. Tolin was working there; it was Stevens who thereupon decided that that would be the best place to rob; it was Stevens who (when Hamilton raised the objection that Mrs. Tolin could identify them) said they would abduct her from the store to get her away from a telephone (T 427-28, 430-34, 459-60, 463-64). All of this was formulated by Stevens before appellant ever came into the picture.

The medical examiner testified that he could not tell whether Mrs. Tolin's injuries were caused by one person or by more than one person (T 381). When Nathan Hamilton was questioned by the police, however, he told them that Rufus Stevens did the killing (T 635, see SR 54) or might have done the killing (T 457), with appellant's knife. The jury heard Nathan Hamilton testify that he and Rufus Stevens were relatives by marriage and close friends (T 398-99, 425), and that Hamilton had been taught where he comes from that you don't turn in a relative for no reason (T 470); however, he was willing to make an exception for killing a woman (T 471). The jury learned that, after the crime, Rufus Stevens had told Nathan Hamilton that they had to get rid of appellant's knife "because that's what it was done with" (T 440). Stevens dispatched Hamilton to get the knife from appellant, who was unwilling to trade (T 411, 416, 421, 440-42). Hamilton testified that if he had gotten appellant's knife he would have given it to Stevens (T 441).

The jury heard that Nathan Hamilton, who had known appellant for seven or eight years, and who had been good friends with Rufus Stevens for six years (T 405, 425), considered Stevens to be tougher, and to be the dominant one of the

two (T 456). While the jury did not hear the testimony, in the resentencing hearing, of appellant's mother and sister, that testimony was consistent with Nathan Hamilton's observation, and indicated that appellant has been, by nature, a "follower" all of his life (ST 24-25, 30). Appellant's personality trait of being a follower is also consistent with the previously discussed testimony (which the jury did hear) of Hamilton, to the effect that the robbery and the abduction of Mrs. Tolin were planned by Rufus Stevens at least an hour and a half before they ever stopped to pick appellant up. According to Hamilton, when appellant got in the car with them, "Rufus Stevens asked him if he wanted to make some money and Scott said sure, what do I have to do. Rufus Stevens said rob a Majik Market. Scott said sure" (T 403). Hamilton heard no more conversation after that (T 403). The evidence shows, therefore, that at the time he agreed to accompany Stevens in robbing the Majik Market, appellant did not know that abducting the clerk was part of Stevens' already formulated plan.

The jury also heard Nathan Hamilton's testimony that several days after the crime, during the conversation in which he [Hamilton] tried to get appellant's knife in order to give it to Rufus Stevens to dispose of, he asked appellant whether he thought it was worth a lousy fifty or sixty dollar robbery to take a girl out of a store and kill her (T 421). Appellant said no, he didn't think it was worth it (T 421). According to Hamilton, "Then, I asked him why they did it. He said that they got her out of the store, away from a telephone, got her out into the country, Rufus Stevens went crazy and started saying she's going to identify us, she's going to identify us" (T 421).

The jury deliberated for nearly six hours before returning a guilty verdict. Twice during the deliberations the jury submitted questions to the effect of "Do we have to be convinced that the defendant personally killed the victim to render a [verdict] of murder in the first degree?" (T 976, see T 972). In the penalty pahse,

no additional evidence was presented by either side; rather, the cause was submitted based upon the arguments of counsel and the instructions of the court. The jury was instructed, inter alia, that it was to base its penalty verdict "upon the evidence which you have heard while trying the guilt or innocence of the defendant, and evidence which has been presented in the proceedings" (T 1023). After 25 minutes of deliberation, the jury returned a life recommendation. See McCampbell v. State, 421 So.2d 1072 (Fla. 1982), in which the trial court rejected a jury's life recommendation, and gave as one of his reasons the brevity of the jury's penalty deliberations. This Court, in vacating the death sentence and remanding for imposition of a sentence of life imprisonment, observed that the jury spent about six hours deliberating in the guilt phase, and approximately six minutes in the penalty phase. "They were instructed to base their verdict on the evidence presented at both proceedings. It cannot be concluded that the jury did not have sufficient time within which to consider its penalty verdict." McCampbell v. State, supra, at 1075.

In his original sentencing order in the instant case, the trial court did not even mention the jury's life recommendation, much less accord it the weight to which it was entitled. See e.g. Tedder v. State, supra, at 910; Thompson v. State, 456 So.2d 444, 447 (1984) (a jury recommendation under Florida's trifurcated death penalty statute is entitled to great weight). Nor did the court articulate any reason for rejecting the jury's life recommendation. See Burch v. State, 343 So.2d 831, 834 (Fla. 1977) (for override to be sustained on appeal, the reasons for trial court's rejection ofjury's life recommendation must be compelling ones); Thompson v. State, 328 So.2d 1, 5 (Fla. 1976) (trial court must express more concise and particular reasons to overrule jury life recommendation and impose death sentence, than to overrule death recommendation and impose life sentence); Smith v. State, 403 So.2d 933, 935 (Fla. 1981) (trial court failed to articulate any reason for rejecting jury's life recommendation). The trial court did, however, include in his sentencing order

a narrative account of the supposed circumstances of the crime, as gleaned from Rufus Stevens' statements (R 114, 116-17). As the state conceded (or, more accurately, insisted) in the original appeal, this was the trial court's justification for overriding the jury's life recommendation; he had "evidence", which they did not, from which to conclude that appellant was a co-participant with Stevens in the actual homicide [see Brief of Appellee, case no. 57,708, p. 29, 30, 32].

In his second sentencing order, the trial court again failed to mention the jury's life recommendation (SR 206-08). The order states, "This court finds that the evidence presented at trial conclusively establishes that Gregory Engle was an active participant in all phases of this crime and at least contemplated that lethal force be used..." (T 206) (emphasis supplied). There is no discussion of whether the jury (which heard the same evidence) could reasonably have found otherwise. With regard to mitigating circumstances, the order contains only the conclusory statement that "This Court finds there exists no mitigating circumstances" (T 208) (emphasis supplied). Again, there is no discussion as to whether the jury, from the evidence it heard at trial, could reasonably have found otherwise. [Nor is there any discussion of the evidence in mitigation presented at the resentencing hearing of October 4, 1984]. In the original sentencing proceeding, the trial court was relying on additional evidence (albeit inadmissible and unreliable additional evidence) than what was before the jury. In the second sentencing proceeding, on the other hand, with regard to the crucial question of appellant's degree of paticipation in the crime as compared with that of Rufus Stevens, the trial court and the jury were presented with essentially the same evidence.

It should be clear, therefore, that the death sentence, and the "life override", which are presently before this court are an entirely different sentence, and an entirely different override, from the ones which were before this Court in 1983. Compare Barclay v. State, 343 So.2d 1266 (Fla. 1977) [Barclay I] with Barclay v. State, 470 So.2d 691 (Fla. 1985) [Barclay V].

In the above case, Barclay, Dougan, and three others, all members of a group that termed itself the Black Liberation Army, decided to kill a randomly chosen white "devil", apparently for the purpose of starting a racial war. The leader of the group, Dougan, wrote a note announcing their intentions. The five men picked up a hitchhiker and drove him to an isolated trash dump. Barclay stabbed the victim repeatedly with a knife, and then Dougan shot him twice in the head. The previously written note was stuck to the victim's body with the knife. After being brought to trial and convicted of the murder, Dougan and Barclay were both sentenced to death, notwithstanding the jury's life recommendation as to Barclay. In the original appeal, this Court affirmed both death sentences, concluding that "Two co-perpetrators who participated equally in the crime would have disparate sentences were the jury's recommendations accepted." Barclay I, supra, at 1271. "This is a case, then, where the jury did not act reasonably in the imposition of sentence, and the trial judge properly rejected one of their recommendations". Barclay I, supra, at 1271.

The next year, this Court remanded for the trial court to conduct a hearing pursuant to Gardner v. Florida, 430 U.S. 349 (1977). Barclay v. State, 362 So.2d 657 (Fla. 1978) [Barclay II]. At the Gardner hearing, one additional witness was called "principally to portray Barclay's lesser role in the events surrounding the murder, and to comment on a second murder in which he was not involved" Barclay v. State, 411 So.2d 1310 (Fla. 1981) [Barclay III]. The trial court again imposed a death sentence, and this Court affirmed, declining to abrogate the "law of the case."[6] Barclay III,

[6] In the present case, for the reasons previously discussed, and particularly because the main source of "evidence" (Stevens' statements) relied on by the trial court in support of the original override was no longer before the court at the time of resentencing, appellant submits that the dicta in the original opinion [Engle v. State, 438 So.2d 803, 812 (Fla. 1983)] plainly cannot be considered "law of the case". Moreover, this Court has the power to reconsider and correct an erroneous ruling that has become "law of the case", where manifest injustice will result from a strict and regid adherence to that doctrine. Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965); Harris v. Lewis State Bank, 482 So.2d 1378, 1383 (Fla. 1st DCA 1986). If appellant is correct in his assertion that the jury acted reasonably in recommending that he be sentenced to life, it will certainly be a manifest injustice if he is allowed to be executed on the basis of dicta to the contrary in the earlier opinion.

supra, at 1310. After the governor signed a death warrant, Barclay filed a petition for habeas corpus. This Court determined that Barclay's original appellate counsel had a conflict of interest and had rendered ineffective assistance; therefore Barclay was granted a new appeal. Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984) [Barclay IV]. In the new appeal, this Court reversed Barclay's death sentence, finding that "[t]he jury apparently distinguished between Barclay and his main co-defendant, Jacob John Dougan, as evidenced by its recommendations of life imprisonment for Barclay (the follower) and death for Dougan (the leader). We hold that there was a rational basis for the jury's distinction between these co-defendants and that the trial court erred in overriding the jury's recommendation." Barclay v. State, 470 So.2d 691, 695 (Fla. 1985) [Barclay V]. See also Woods v. State, supra.

In Barclay, there was a reasonable basis for the jury's life recommendation, i.e. Barclay's lesser culpability as compared with that of Dougan, even though the evidence clearly showed (1) that Barclay was one of the individuals who had planned to commit the murder even before the victim was selected, and (2) that Barclay personally inflicted repeated stab wounds on the victim before Dougan shot him. In the present case, in contrast, the state's own evidence showed that Rufus Stevens planned to rob the Majik Market and to abduct Mrs. Tolin from the store an hour and a half before Stevens and Nathan Hamilton picked up appellant at the Wemmers' house. The state's evidence futher showed that when Stevens was recruiting appellant to assist him, he told him about the robbery, but not about the planned abduction. The medical examiner could not tell whether Mrs. Tolin's injuries were inflicted by one person or two persons. The state's main witness, Nathan Hamilton, believed that Rufus Stevens did the killing with appellant's knife. Hamilton tried unsuccessfully to get the knife from appellant, for Stevens to dispose of. When Hamilton asked appellant why they had killed the girl, appellant replied that Rufus Stevens "was crazy" because he thought she was going to identify them. [As Hamilton had previously testified, it was Hamilton's own concern about identification that had prompted Stevens' decision - in appellant's absence - to take the woman out of the store]. Hamilton, who was a relative by marriage and a close friend of Stevens, was of the opinion that Stevens was a stronger, more dominant personality than appellant. That opinion appears to have been corroborated by Stevens' undisputed role as the planner of, and the recruiter for, the crime. Appellant's responses that "sure" he would like to make some money and "sure" he would help Stevens rob a Majik Market are consistent with the behavior of a "follower" [see also the testimony of appellant's mother and sister], and a person with a "diminished capacity for controlling impulses, anticipating consequences, and utilizing past experiences to guide ongoing behavior" [psychological evaluation of Dr. James Valley, SR 78].

Thus, even more so than in Barclay, the jury had a reasonable basis to conclude that appellant (the follower) was less culpable than Rufus Stevens (the leader), since here there was no evidence that appellant was involved in the planning of the murder, or even anticipated that it was going to occur, and here there was no evidence that appellant personally participated in the actual killing. The jury's six hours of deliberations in the guilt phase, their questions as to whether they had to be convinced that appellant personally killed the victim, and their 25 minutes of deliberation in the penalty phase before returning a life recommendation, all clearly reflect the jury's reasonable concern about appellant's degree of participation in the crimes, vis-a-vis that of Stevens.

See also Hawkins v. State, 436 So.2d 44 (Fla. 1983) (finding that there was a reasonable basis for the jury's life recommendation, where jury determined that co-defendant, not Hawkins, was the triggerman; life recommendation was reasonable notwithstanding testimony of a state witness - relied upon by the trial court in imposing the death sentence - that Hawkins had stated earlier in the evening of the murders that he wanted to go out to Golden Gate and "blow away a couple of dudes").

This Court has repeatedly held that a jury's recommendation as to the appropriate penalty reflects the conscience of the community and is entitled to great weight. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Provence v. State, 337 So.2d 783, 787 (Fla. 1976); McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Thompson v. State, 456 So.2d 444, 447 (Fla. 1984). The trial court may not override a life recommendation unless the facts justifying a death sentence are "so clear and convincing that virtually no reasonable person could differ". Tedder v. State, supra, at 910; Provence v. State, supra, at 787; McCampbell v. State, supra, at 1076; Thompson v. State, supra, at 447. Conversely, where reasonable persons can differ over the fate of a capital defendant, it is the jury's determination, and not the judge's which must be given effect. Provence v. State, supra, at 787. The trial court's failure to find any mitigating circumstances is not dispositive; an override is improper where the jury could reasonably have based its recommendation on statutory or non-statutory mitigating factors in its view of the evidence. See Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981); Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982); Cannady v. State, 427 So.2d 723, 731 (Fla. 1983); Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983); Herzog v. State, 439 So.2d 1372, 1380 (Fla. 1983); Thompson v. State, 456 So.2d 444, 447 (Fla. 1984); Rivers v. State, 458 So.2d 762, 765 (Fla. 1984); Barclay v. State, 470 So.2d 691, 695 (Fla. 1985); Amazon v. State, 487 So.2d 8, 13 (Fla. 1986).

In Spaziano v. Florida, 468 U.S. ___, 82 L.Ed.2d 340, 356 (1984), in which the U.S. Supreme Court upheld the constitutionality of the "override" provision of Florida's death penalty law, it stated, "This Court already has recognized the significant safeguard the Tedder standard affords a capital defendant in Florida [citations omitted]. We are satisfied that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role." Several months after Spaziano was decided, this Court stated that "In the years since [Tedder was decided] we have not wavered from the Tedder test and

have consistently applied it to the facts and circumstances of cases on review where the trial judge has overridden a jury recommendation of life imprisonment and imposed the death penalty." Thompson v. State, 456 So.2d 444, 447 (Fla. 1984). See also Rivers v. State, 458 So.2d 762, 765 (Fla. 1984); Barclay v. State, 470 So.2d 691, 694-95 (Fla. 1985); Huddleston v. State, 475 So.2d 204, 206 (Fla. 1985); Amazon v. State, 487 So.2d 8, 13 (Fla. 1986).

One of the core purposes of Florida's trifucated death penalty procedure, is to ensure that "the inflamed emotions of jurors can no longer sentence a man to die." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). Conversely, where a life recommendation appeared to have been improperly influenced by defense counsel's reading of an "extremely vivid and lurid" description of an electrocution, this Court affirmed the trial judge's override. Porter v. State, 429 So.2d 293, 296 (Fla. 1983). In the present case, it was the prosecutor who sought to play upon the jury's natural sympathy for the victim and emotional reaction to the crime. He argued:

> Let me make it perfectly clear before we get into all of this: mitigating and aggravating circumstances that we're talking about, that little fine young lady, five feet tall, 115 pounds, 24 years old with a husband and children, working at night at probably minimum wages, with two sons and I want you, you have the right now to think about that Kay Tolin, you have a right to think about it.
>
> We're in a different phase, you have a right to think about that little lady, that is, before the murderer, that is, before he got in the death car. I want you to remember, ladies and gentlemen, I want you to remember that Rufus Stevens would not go to that Majik Market unless somebody went with him. The only reason we've got the after picutre is because he got in the car and said yes, yes, I will do it. Rufus didn't have the guts to do it by himself. He told it over and over again, let's rob this store. He didn't have the guts to do it by himself but he went out and got Mr. Kool. Mr. Kool said sure. Sure.
>
> That's Kay Tolin afterwards, that's Kay Tolin after. Look at her. That's a human being in Jacksonville, Duval County, Florida, in March of 1979.
>
> Pardon me, Your Honor, I didn't mean to make that noise.

(T 989-90).

The prosecutor also sensed, correctly, that the jury had serious questions concerning appellant's degree of participation in the murder. He argued:

> You're concerned whether he had to have actually thrust the knife on her. I know you were concerned about that. You asked questions during the trial about it and we lawyers are and the Judge is concerned about it. We couldn't answer your questions because of the law and I understand the law but we did the best we could and athe Judge did the best he could. But if you believe, if you believe that Rufus Stevens killed that girl for the purpose of not being identified, that he formed the intent to kill her for that purpose, that is first degree murder and then if you believe that he gave this knife to Rufus Stevens, you find he is just as guilty as Rufus Stevens.

(T 993-94).

* * *

> I don't care if Rufus did it, if Rufus Stevens did it, I don't care if he actually put his hand or whatever it was, he was there. You can't any more separate him from that death car for one split second, you can't separate him from that death car that night from 2:00 o'clock in the morning until daylight, you can't separate them from that car, you got to put Kay Tolin in it and you got to put that murderer in it and you got to put Scott Engle in it. He's there, she's there and it all happened there or right around him.

(T 955).

The prosecutor may not have cared if Rufus Stevens did it, but the jury obviously did care. The jury could reasonably have concluded from the evidence that Stevens was the leader and appellant the follower; that Stevens planned the robbery and the abduction, and enlisted appellant's aid without even telling him about the latter part of the plan; that Stevens was the one who expressed concern about being identified, and who "went crazy" once they got the victim out of the store. The jury could reasonably have believed, from the testimony of the state's own witness Nathan Hamilton, that (as the prosecutor phrased it) "Rufus Stevens killed that girl for the purpose of not being identified, that he formed the intent to kill her for that purpose...." (T 994). Then, the prosecutor continued in his argument to the jury, "if you believe that he [appellant] gave this knife to Rufus Stevens,

you find he is just as guilty as Rufus Stevens" (T 994). And that, of course, is true. Appellant, like Stevens, is guilty of first degree murder. Barclay, like Dougan, was guilty of first degree murder. Barclay v. State, supra, [Barclay V]. Hawkins, like Troedel, was guilty of first degree murder. Hawkins v. State, supra. Bean, like Woods, was guilty of first degree murder. Woods v. State, supra. But, as the jury in this case was able to recognize (and the trial court evidently was not[7]), it does not necessarily follow that appellant is equally as deserving of the death penalty as Rufus Stevens. Even more so than in Barclay (where it was undisputed that the "follower", Barclay, knew from the beginning that a murder was going to occur, and where Barclay personally inflicted the first injuries on the victim by stabbing him repeatedly), and even more so than in Hawkins (where there was at least some evidence that Hawkins had been talking with his co-defendant earlier in the evening and had expressed the desire to "blow away" the two victims), the jury in the present

---

[7] At the original sentencing proceeding on August 17, 1979, in response to defense counsel's effort to persuade him to follow the jury's life recommendation, the trial court asked:

> Are you under the impression that if two men participate in a crime like this, one of them kills her and the other one sits there and aids and abets, that he is not equally guilty?
>
> MR. SHORSTEIN: Your Honor, I'm not arguing with that, I'm not arguing that he's not equally guilty of murder.
>
> THE COURT: That he should not suffer the same fate?
>
> MR. SHORSTEIN: Absolutely, Your Honor, and I have cases to cite to Your Honor that the Supreme Court finds the distinction differentiation.
>
> THE COURT: Well, then, the Supreme Court will just have to make its ruling in this case, too.
>
> MR. SHORSTEIN: Well, Your Honor, I'm just trying to argue what I think the law is to the Court.
>
> THE COURT: Well, I have to listen to you and you have, I must say, done a fantastically great job in coming up with these innovations. They're interesting.

(T 1062-63).

case had a reasonable basis to recommend life.

A final comment needs to be made about the jury whose recommendation the state is now seeking to discard as "unreasonable". The appellate courts of this state have repeatedly stated and followed the principles that jurors are presumed to live up to the obligations of their oaths [see e.g., Burnette v. State, 157 So.2d 65 (Fla. 1963), Silvestri v. State, 332 So.2d 351 (Fla. 4th DCA 1976)], and that jurors are presumed to follow the instructions of the court [see e.g., McGee v. State, 304 So.2d 142 (Fla. 2d DCA 1974); Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981)]. In Paramore v. State, 229 So.2d 855, 860 (Fla. 1969), this Court observed that "[t]he law requires that juries be composed of persons of sound judgment and intelligence, and it will not be presumed that they are led astray, to wrongful verdicts, by the impassioned eloquence and illogical pathos of counsel."

In the present case, the prospective jurors were thoroughly examined by both counsel on voir dire (T ii-279). Two jurors who indicated at some point that they would not vote for the death penalty regardless of the circumstances were challenged for cause by the state, and were excused. Engle v. State, 438 So.2d 803, 807-08 (Fla. 1983); see Witherspoon v. Illinois, 391 U.S. 510 (1968); Wainwright v. Witt, 469 U.S. ___, 83 L.Ed.2d 841 (1985). Thus, the jury was comprised entirely of people who stated, under oath, that they would follow the law and the instructions of the court, and that they would recommend the death penalty if the circumstances warranted it. The prosecutor accepted the jury without exhausting his peremptory challenges (T 239, 242).

The twelve jurors who heard the evidence in this case, found appellant guilty of first degree murder, and recommended that he be sentenced to life imprisonment, are briefly described in the twelve paragraphs which follow (see SR 69-72):

1. Eugene Wortsman, the foreman of the jury, was a college graduate who had been a military attorney in the United States Air Force. He had lived in Jacksonville for three and a half years, was a general agent for Sun Life Insurance Company, was maried and had two children (T 32-34). He said this about the death penalty: "I feel that death penalty should be applied in certain cases and if the evidence leads me to believe that the death penalty is appropriate, I will so vote but if it appears to me that, you know, 25 years was more appropriate, I would so vote" (T 87-88).

2. Gloria J. Smith was a lifelong resident of Jacksonville, worked as a substitute teacher and a housewife, was married to a man who worked for United Parcel Service, and had two children (T 30, 32, 64-65). In response to State Attorney Austin's questions, she stated that she could return a verdict of guilty in a death penalty case and she was not opposed to the death penalty as a matter of principle (T 53-56).

3. George A. Bush grew up in Green Cove Springs, graduated from the University of Florida, was employed as an insurance agent, and was married with two children (T 146-147). He was death qualified by general questions of Mr. Austin (T 53-56), and he had this to say about the death penalty: "I think it's a very tough issue and I would be personally involved if there are crimes that in my opinion do deserve either the death penalty or people put away from society. I believe it would take longer for me to make a decision to send somebody to the electric chair but I feel I could do it" (T 153).

4. Richard C. Taylor was a student at the University of North Florida, retired after 20 years in the Navy. He was married to a school teacher and had two children (T 33-35). He was death qualified by the general questions of Mr. Austin (T 53-56), and he had this to say about the death penalty: "I feel that there are times when death penalty is appropriate, not in every case where someone is found guilty of first degree, though, it depends on the situation" (T 88).

5. Carol Ring was a school teacher married to a pilot working for the Seaboard Coastline Railroad Company, and had two grown sons (T 217). She had this to say about the death penalty: "Well, I would not feel that I was at either extreme; definitely not. I do not think that every crime or every murder would require the death penalty but I do think there are some cases where the death penalty should be used" (T 235-36).

6. Lucille F. Carter had lived in Jacksonville for 35 years, was a secretary for an ambulance company, was married to a ret..ed civil service employee, and had four children (T 38-40). She was death qualified by the questions of Mr. Austin (T 53-56).

7. Debra A. Thee was an unmarried accounting clerk for First Federal Savings and Loan who had gone all the way through school in Jacksonville and whose family still lived in town (T 40-42). In answer to the question whether she could recommend either life or death, she said: "Based on the circumstances, I could, it would just depend on the circumstances and then I could say either. I am not extremely opposed to the death penalty, and I think that it can be, you know, a deterrent in crime, you know, depending on what I hear" (T 92). In response to the question whether she could impose the death penalty, if the circumstances warranted, she stated, "Right, if I felt like it did" (T 92).

8. Wanda Stewart was a widow who had lived in Jacksonville for five years. Her husband had been a hospital corpsman in the United States Navy (T 115, 135). She was death qualified by the general questions of Assistant State Attorney Cone (T 122-23) and, in response to the questions of defense counsel, she said that she could impose the death penalty, but it depended upon the circumstances (T 134).

9. Mary M. Frauhiger had lived in Jacksonville for 23 years. She was married, had four children, worked as a clerk at Sav-a-Stop, and was married to a roofer (T 166-167). She had this to say about the death penalty: "Well, I don't - I think

the death penalty would meet with each case. It would depend on the circumstances and the evidence of the case" (T 174).

10. Robert B. Delavan was a widower with three children who had lived in Jacksonville for 25 years. He was employed with the State Department of Agriculture (T 170-171). He said he had the same sentiments about the death penalty as those expressed by Mary M. Frauhiger (T 174).

11. June E. Miller was a bookkeeper and cashier in a Jacksonville business operated by her husband. She had two grown sons (T 218). She said she would have to weigh all the evidence before deciding on life or death and that she believed she had the same feelings as juror Carol Ring (T 235-36).

12. Margaret Holloway was a lifelong resident of Jacksonville, employed as a school teacher, married to an architect and had five children. She also graduated from Florida State University (T 46-47, 82). She was death qualified by the general questions of Mr. Austin (T 53-56), and, in addition, had these comments about the death penalty: "Well, I don't have a pre-conceived feeling about it, I'd say each case on its own merit would have to be judged" (T 94).

At the time he accepted these twelve people to serve as jurors, the prosecutor ingratiatingly announced that the state would "... be pleased to try this case before this jury" (T 242). If these jurors had recommended that appellant be sentenced to death, Mr. Austin's high opinion of them would undoubtedly remain intact. However, because these jurors were <u>not</u> swayed by Mr. Austin's inflammatory rhetoric to disregard their legitimate concerns about appellant's degree of participation in the murder, the state now seeks to characterize them as "unreasonable".

As has previously been discussed, the trial court cannot reject a jury's life recommendation unless the facts are "so clear and convincing that no reasonable person could differ" on the propriety of the death sentence. <u>Tedder v. State</u>, <u>supra</u>, at 910; <u>Hawkins v. State</u>, <u>supra</u>, at 47; <u>Barclay v. State</u>, <u>supra</u>, at 694. This was

clearly not such a case, even when the trial court was relying on Rufus Stevens' inadmissible and unreliable statements as his basis for disagreeing with the jury's view of the evidence. Now, with Stevens' statements no longer before the court, even the purported basis for the court's rejection of the jury's recommendation is gone.

There was a rational basis for the jury's recommendation of life; and since reasonable people could differ as to the propriety of the death sentence, the trial court was not free to substitute his own view of the evidence to override the life recommendation. See Welty v. State, supra, at 1164; Gilvin v. State, supra, at 999; Cannady v. State, supra, at 731; Hawkins v. State, supra, at 47; Thompson v. State, supra, at 447-48; Rivers v. State, supra, at 765; Barclay v. State, supra, at 695; Huddleston v. State, supra, at 206; Amazon v. State, supra, at 13. Accordingly, appellant's death sentence should be reversed, and the case remanded to the trial court with directions to impose a sentence of life imprisonment, without eligibility for parole for twenty-five years, in accordance with the jury's recommendation.

ISSUE II

IMPOSITION OF THE DEATH PENALTY UPON APPELLANT IS CONSTITUTIONALLY PROHIBITED UNDER THE PRINCIPLES OF ENMUND v. FLORIDA, 458 U.S. 782 (1982), IN THE ABSENCE OF PROOF THAT APPELLANT KILLED, ATTEMPTED TO KILL, OR CONTEMPLATED THAT LIFE WOULD BE TAKEN.

In Enmund v. Florida, 458 U.S. 782, 787 (1982), the United States Supreme Court said:

> Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.

The sentencing order in the present case, on resentencing, contains the following statement, "This court finds that the evidence presented at trial conclusively establishes that Gregory Engle was an active participant in all phases of this crime and at least contemplated that lethal force be used..." (SR 206). Since the U.S. Supreme Court has held that the required factual findings to satisfy the Enmund principle may be made at any point in the state court proceedings - whether by the jury, the trial court, or the state appellate court [Cabana v. Bullock, 474 U.S. ___, 88 L.Ed.2d 704 (1986)], appellant is not contending here that the trial court was without authority to make a factual finding pursuant to Enmund. Whether or not there existed a reasonable basis for the jury's life recommendation - the Tedder issue - is essentially one of state law (though not without constitutional ramifications) [see Spaziano v. Florida, supra], and has been argued at length in Issue I. The Enmund question gives rise to a second issue - one of federal constitutional law - and the problem here lies not in who made the findings of fact, but, rather, in the absence of evidence to support those findings. Quite simply, the trial court's findings that appellant was "an active participant in all phases of the crime"[8] and that he "at least contemplated that lethal force be used" are not supported by the evidence presented at trial. By way of contrast, in the two decisions most prominently relied on by appellant in Issue I - Barclay v. State, 470 So.2d 691 (Fla. 1985) and Hawkins v. State, 436 So.2d 44 (Fla. 1983) - both of which were reversed for imposition of a life sentence pursuant to the Tedder principle, there was evidence which would have supported an Enmund finding. Barclay was one of the individuals who planned to kill a white "devil", and who drove around Jacksonville in search of a victim

[8] In Cabana v. Bullock, supra, 88 L.Ed.2d at 718-19, the Supreme Court held that this Mississippi Supreme Court's findings that Bullock "was present, aiding and assisting in the assault upon, and slaying of, Dickson" and that "the evidence is overwhelming that [Bullock] was an active participant in the assault and homicide upon Mark Dickson" were not sufficient to satisfy the Enmund criteria.

[intent that a killing take place or that lethal force be employed]. Barclay was also the individual who repeatedly stabbed the victim with a knife before Dougan shot him [killed or attempted to kill]. In Hawkins, which is factually somewhat closer to the instant case, there was at least some evidence - the testimony of a state witness that earlier in the evening of the murders, Hawkins had been at a bar talking about wanting to go out to Golden Gate and "blow away a couple of dudes" - which might have supported a finding that Hawkins intended that a killing take place or that lethal force be used. In the present case, according to the testimony of Nathan Hamilton, appellant did not even know, at the time he agreed to accompany Rufus Stevens in robbing the Majik Market, that Stevens intended to abduct the clerk. While it can reasonably be inferred from the evidence that, at some point, appellant gave his knife to Stevens, the evidence does not reveal when that occurred, nor does it demonstrate that appellant knew that Stevens was going to "go crazy" and kill Mrs. Tolin. In the absence of evidence to meet the criteria of Enmund v. Florida, supra, the Eighth Amendment prohibits the imposition of the death penalty upon appellant, and his sentence must be reduced to life imprisonment, without eligibility for parole for twenty-five years.

VI CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court reverse his death sentence and remand this case to the trial court with directions to impose a sentence of life imprisonment, without eligibility for parole for twenty-five years, in accordance with the jury's recommendation.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General Raymond L. Marky, The Capitol, Tallahassee, Florida; and by mail to Mr. Gregory Scott Engle, #069240, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, this 9 day of July, 1986.

STEVEN L. BOLOTIN
Assistant Public Defender

Bolotin

IN THE SUPREME COURT OF FLORIDA

GREGORY SCOTT ENGLE,

Appellant,

v. CASE NO.: 68,548

STATE OF FLORIDA,

Appellee.
_____/

ANSWER BRIEF OF APPELLEE

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APPENDIX

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TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case found in Appellant's brief. Appellee adopts the Statement of the Facts found in the opinion of this Court (Engle v. State, 438 So.2d 803 (1983)). The facts as stated therein amply support the verdict of the jury finding Appellant guilty of murder in the first degree, and there is no claim to the contrary by Appellant.

As to the resentencing, Appellant's summary of the testimony is reasonably accurate.

In sentencing Appellant to death, the trial judge found that the evidence at trial conclusively established that Appellant was an active participant in all phases of the crime and at least contemplated that lethal force be used (R 206). The court found no mitigating circumstances, and the following aggravating circumstances:

> A. THE FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED, OR WAS AN ACCOMPLICE, IN THE COMMISSION OF, OR IN ATTEMPTING TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, A ROBBERY, SEXUAL BATTERY, ARSON, BURGLARY, KIDNAPPING, OR AIRCRAFT PIRACY OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.
>
> Engle's roommate testified that Engle had been gone all night. The defendant made certain incriminating statements to Nathan Hamilton concerning blood on his knife, and further statements that it had not been worth killing a girl for $50 or $60 dollars.
>
> Other evidence establishing this aggravating circumstance includes: 1) the victim's blood was found on the trunk latch in the car used

in the abduction, 2) semen was found on the backseat of the car used in her abduction, and 3) testimony from the medical examiner establishing that the victim had been the subject of a violent battery.

The only conclusion a reasonable person could draw from the evidence taken in its totality is that Kathy Tolin, a young, petite, mother of two, was robbed, kidnapped, brutally raped, and mutilated, before being violently murdered.

B. THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PRESENTING A LAWFUL ARREST OR AFFECTING AN ESCAPE FROM CUSTODY.

The evidence presented at trial conclusively established that Gregory Engle and Rufus Stevens murdered Kathy Tolin to prevent their apprehension. Both Engle and Stevens lived in the neighborhood in which the convenience store was located and both were known to the victim. Additionally, the defendant made statements to a witness concerning Stevens' fear that the victim would identify both he and Stevens.

The only reasonable inference that can be drawn from the evidence is that Kathy Tolin was murdered so that her killers would not be apprehended.

C. THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

Evidence proved beyond any doubt that the murder of Kathy Tolin was the conclusion of a criminal episode that began in the scheme of Engle and Stevens to rob the convenience store.

D. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Testimony established that a large object had been inserted into the victim's vagina causing a severe laceration. After being assaulted, she was brutally murdered. Testimony revealed that the victim was first

strangled with a ligature and while she was still alive an unsuccessful attempt was made to stab her in the back with a broken knife later found to belong to Rufus Stevens. The knife belonging to Gregory Engle was used to repeatedly stab her in the back, penetrating her lungs.

The evidence established beyond any doubt that Kathy Tolin's murderers by their acts, cruelly inflicted unbelievable terror, wickedness and cruelty, all of which were designed to inflict a high degree of pain with utter indifference to the suffering of Kathy Tolin.

(R 206-208).

In this Court's opinion, reviewing Appellant's first death sentence, this Court found that the trial judge's findings were valid, except for those findings based on Steven's confessions/ admissions emanating from the separate trial of Stevens.

SUMMARY OF ARGUMENT

The trial judge did not err in rejecting the jury's life recommendation and concluding that there was no reasonable basis for such life recommendation. The trial court considered all the evidence before the jury, as well as the nonstatutory mitigating evidence not presented to the jury, and concluded that each of the aggravating factors outweighed the nonexistent mitigating factors. This Court cannot speculate as to whether there was any reasonable basis for the jury to recommend life when there was no evidence of any such reasonable basis, to-wit: four aggravating and no mitigating circumstances.

Further, there was sufficient evidence to support the trial court's imposition of death as Appellant was an active participant in the crime, having been present at all stages of the crime, Appellant at least contemplated the use of lethal force, as he was present and his knife was used.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN REJECTING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT, THEREBY IMPOSING A SENTENCE OF DEATH.

The jury's advisory sentence, pursuant to § 921.141(2), Fla. Stat., was life imprisonment. The trial court, on resentencing pursuant to this Court's opinion, "reassessed all aggravating and mitigating circumstances without taking into conside.ation inadmissible statements made by Rufus Stevens." (R 206). The court also "thoroughly studied the record" and considered all arguments by counsel. (R 206). In resentencing Appellant to death, the court carefully considered all the statutory aggravating circumstances and non-statutory mitigating circumstances, and again found four aggravating circumstances and no mitigating circumstances. (R 206-208).

Appellant now contends the trial court erred in overriding the jury's recommendation of life, because there was a reasonable basis for the jury's life recommendation. The general rule espoused in Tedder v. State, 322 So.2d 908 (Fla. 1975) is that in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. This Court in Engle l recognized that

principle of law, and then found:

> The trial judge found four aggravating circumstances, to-wit: that the murder was committed after appellant had engaged in a kidnapping and rape, that it was committed for pecuniary gain, and that it was especially heinous, atrocious and cruel. He found no mitigating circumstances. Review of the record demonstrates the validity and propriety of the above findings. [Emphasis supplied.]

(438 So.2d at 812). Since this Court has already reviewed the record and found that the record demonstrates the validity of the court's findings as to the override (except for consideration of the inadmissible evidence), the court's findings in the resentencing order are due the same treatment. This Court did not find that the trial judge's findings with respect to aggravation and mitigation were erroneous.

In this resentencing appeal, there is no issue concerning the jury's recommendation of life. At the resentencing hearing the jury was not involved; there was no new evidence or testimony presented to the jury. Thus, there is no possible way for this court to now speculate as to what the jury might have recommended had the jury heard any of the evidence which was presented at the resentencing hearing and which could have been presented in mitigation before the jury the first time around but was not so presented.

Section 921.141(2) Florida Statutes makes clear that the jury's role at sentencing in a capital case is merely advisory

and is not binding on the trial court. Section 921.141(3) further provides that:

> Notwithstanding the recommendation of the majority of the jury, the court after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth its findings upon which the sentence of death is based as to the facts . . . . [Emphasis supplied.]

This Court has consistently and repeatedly noted that in Florida it is the judge and not the jury that imposes sentence; the jury only recommends. Thomas v. State, 456 So.2d 454 (Fla. 1984); State v. Dixon, 283 So.2d 1 (Fla. 1973); Lamadline v. State, 303 So.2d 17 (Fla. 1974). The ultimate decision as to whether the death sentence should be imposed rests with the trial judge. Thomas, supra; Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. den., 439 U.S. 920 (1978).

Pursuant to the statute governing capital sentencing proceedings, and pursuant to prevailing case law, the trial judge may appropriately weigh aggravating and mitigating circumstances regardless of what the jury's recommended sentence has been. Here, the trial court, in its role as the ultimate sentencer considered all the evidence that was before the jury, as well as the nonstatutory mitigating evidence not presented to the jury, and concluded that each of the aggravating factors outweighed the nonexistent mitigating factors. Appellant is asking this Court to require trial judges to speculate as to whether there

was any reasonable basis for a jury to recommend life when there are four aggravating circumstances and no mitigating circumstances. This Court cannot speculate as to whether there was any reasonable basis for the jury's recommendation of life--indeed, for this Court to speculatively flyspeck the record in search of any possible circumstance which could possibly have supported the recommendation of life completely obfuscates the statutory function of the sentencing judge. Tedder cannot reasonably be construed as creating a carte blanche license by which the court may guess and speculate as to the basis for the jury's recommendation and, in the process, ignore the well-considered written findings of the sentencing judge. This Court is not a legislative body and should not engage in "judicial legislation" by judicially abolishing the statutory jury override found in § 941.141 Fla. Stat.; such action would clearly be contrary to legislative intent and would reduce the trial judge's sentencing function to that of merely explaining why he/she concurs with a jury recommendation. The Florida legislature has not seen fit to abolish the jury override; nor has the legislature required the jury to provide written findings in support of its sentence. Without written findings in support of the jury's sentence, such sentence is advisory and can never be given more deference than a judge's sentence supported by written findings. According such deference to a jury's advisory sentence unsupported by written findings constitutes the very arbitrariness and inconsistency condemned by the United States Supreme Court in Furman v. Georgia,

408 U.S. 238 (1972).

Appellant asks this Court to speculate[1] as to why the jury recommended life, by looking at the evidence before the jury as opposed to the sentencer's order. However, this Court will never know whether the jury's recommendation was predicated on rational or arbitrary reasons since the jury did not enumerate its findings. To satisfy the constitutional standards espoused in Furman v. Georgia, and Profitt v. Florida, 428 U.S. 242 (1972), the trial judge's sentencing order must be the order reviewed, not the unstated conclusions of the jury. Whereas here, the trial judge has determined the presence of four aggravating factors and no mitigating factors, and his findings are not erroneous, this Court must agree that death is the appropriate sentence. Cf. Wainwright v. Goode, 464 U.S. 78 (1983); Parker v. State, 450 So.2d 750 (Fla. 1984); Groover v. State, 458 So.2d 226 (Fla. 1984); Johnson v. State, 393 So.2d 1069 (Fla. 1980); Spaziano v. State, 433 So.2d 508 (Fla. 1983).

The facts justifying Appellant's death sentence are so clear and convincing that reasonable persons could not differ as to the appropriate sentence. The evidence presented at trial

[1]For instance, Appellant in his brief states that "The jury could reasonably have concluded from the evidence that Stevens was the leader and appellant the follower; that Stevens planned the robbery and abduction, and enlisted appellant's aid without even telling him about the latter part of the plan; that Stevens was the one who expressed concern about being identified, and who 'went crazy' once they got the victim out of the store." Appellant's initial brief, p.36. Appellant continues on in speculating about what the jury could have believed, throughout the brief.

conclusively established that Appellant and Rufus Stevens "robbed, abducted, raped, mutilated, and then murdered" Kathy Tolin. Appellant was an active participant in all phases of this crime and Appellant contemplated that lethal force be used. The trial judge explicitly listed the facts supporting his findings as to each aggravating factor. Implicit within the detailed order of the trial court is the fact that, by necessity, the court had to consider whether, under the facts before him, the jury had some reasonable basis for making its life recommendation. Clearly, the trial judge concluded, based upon his own reasoned judgment, that there existed no such basis. Reasonable persons cannot differ as to the appropriate sentence for Appellant--death.

ISSUE II

IMPOSITION OF THE DEATH PENALTY UPON APPELLANT IS NOT CONSTITUTIONALLY PROHIBITED UNDER THE PRINCIPLES OF ENMUND V. FLORIDA.

Appellant contends there was an absence of evidence to support the trial judge's findings that Appellant was an "active participant in all phases of the crime" and that he "at least contemplated that lethal force be used," citing to Enmund v. Florida, 458 U.S. 782 (1982). In Enmund the Supreme Court held that Florida's death penalty statute cannot be applied to one who did not kill, attempt to kill, intend to kill, or intend that lethal force be used. Here, as in Hall v. State, 420 So.2d 874 (Fla. 1982), Appellant provided the weapon used to kill the victim and was present at her death. Appellant was involved in the entire sequence of events, ending in the murder of the victim. There is no doubt that Appellant at least contemplated that lethal force be used. See Ruffin v. State, 420 So.2d 591 (Fla. 1982); and Brown v. State, 473 So.2d 1260 (Fla. 1985).

CONCLUSION

For the reasons set forth above, the sentence of death should be upheld.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was hand delivered to Steven L. Bolotin, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 3rd day of September, 1986.

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IN THE SUPREME COURT OF FLORIDA

GREGORY SCOTT ENGLE,

Appellant,

v. CASE NO. 68,548

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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APPENDIX

G

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

GREGORY SCOTT ENGLE,
Appellant,
v. CASE NO. 68,548
STATE OF FLORIDA,
Appellee.

REPLY BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

The state's brief will be referred to herein as "AB". Other references will be as denoted in appellant's initial brief. This reply brief is directed to Issue I on appeal; appellant will rely on his initial brief with regard to Issue II.

V ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY REJECTING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND BY IMPOSING THE DEATH PENALTY UPON APPELLANT.

The state, in its answer brief, completely fails to demonstrate - in fact, does not even make any real attempt to demonstrate - that the jury's recommendation of life imprisonment was "unreasonable". Contrary to the well-established Tedder standard (to which it pays lip service, AB 4), the state seems to be suggesting that since nobody knows for certain in this case (or, for that matter, in any other case) exactly what findings the jury made, this Court may not consider whether there was any reasonable basis for the jury to recommend life,

but must look only to the four corners of the trial court's sentencing order. What the state is doing is asking this Court to review this death sentence, imposed pursuant to the trial court's override of the jury's life recommendation, exactly the same as if the jury had recommended death. That, needless to say, is not the law. This Court has on many occasions reversed a death sentence for imposition of a life sentence without parole for 25 years, in accordance with the jury's life recommendation, where there existed a reasonable basis for the jury's recommendation.[1] See Taylor v. State, 294 So.2d 648 (Fla. 1974); Slater v. State, 316 So.2d 539 (Fla. 1975); Swan v. State, 322 So.2d 485 (Fla. 1975); Tedder v. State, 322 So.2d 908 (Fla. 1975); Thompson v. State, 328 So.2d 1 (Fla. 1976); Jones v. State, 332 So.2d 615 (Fla. 1976); Provence v. State, 337 So.2d 783 (Fla. 1976); Chambers v. State, 339 So.2d 204 (Fla. 1976); Burch v. State, 343 So.2d 831 (Fla. 1977); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Buckrem v. State, 355 So.2d 111 (Fla. 1978); Brown v. State, 367 So.2d 616 (Fla. 1979); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Neary v. State, 384 So.2d 881 (Fla. 1980); Williams v. State, 386 So.2d 538 (Fla. 1980); Phippen v. State, 389 So.2d 991

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[1] The fact that the trial court, in his sentencing order, may have found aggravating circumstances and no mitigating circumstances is not dispositive; an override is improper where the jury could reasonably have based its recommendation on statutory or non-statutory mitigating factors in its view of the evidence. See Welty v. State, supra, at 1164; Gilvin v. State, supra, at 999; Richardson v. State, supra, at 1094; Herzog v. State, supra, at 1380; Thompson v. State, supra, at 447; Barclay v. State, supra, at 695; Amazon v. State, supra, at 13. Cf. Cannady v. State, supra, at 731 (override was improper where jury could reasonably have found mitigating circumstances from the testimony of psychologist, even though trial court was not necessarily compelled to reach same conclusions); Rivers v. State, supra, at 765 ("Here, it appears that the judge merely disagreed with the jury's recommendation. In this case, there was substantial evidence offered in mitigation which the jury could reasonably have relied on in reaching its advisory verdict. We therefore conclude that the recommendation of life imprisonment should have been followed.")

(Fla. 1980); Barfield v. State, 402 So.2d 377 (Fla. 1981); Welty v. State, 402 So.2d 1159 (Fla. 1981); Stokes v. State, 403 So.2d 377 (Fla. 1981); Smith v. State, 403 So.2d 933 (Fla. 1981); Odom v. State, 403 So.2d 936 (Fla. 1981); McKennon v. State, 403 So.2d 389 (Fla. 1981); Goodwin v. State, 405 So.2d 170 (Fla. 1981); McCray v. State, 416 So.2d 804 (Fla. 1982); Gilvin v. State, 418 So.2d 996 (Fla. 1982); Welsh v. State, 418 So.2d 1000 (Fla. 1982); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Cannady v. State, 427 So.2d 723 (Fla. 1983); Norris v. State, 429 So.2d 688 (Fla. 1983); Washington v. State, 432 So.2d 44 (Fla. 1983); Webb v. State, 433 So.2d 496 (Fla. 1983); Hawkins v. State, 436 So.2d 44 (Fla. 1983); Richardson v. State, 437 So.2d 1091 (Fla. 1983); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Thompson v. State, 456 So.2d 444 (Fla. 1984); Rivers v. State, 458 So.2d 762 (Fla. 1984); Barclay v. State, 470 So.2d 691 (Fla. 1985); Huddleston v. State, 475 So.2d 204 (Fla. 1985); Amazon v. State, 487 So.2d 8 (Fla. 1986); Brookings v. State, __So.2d__ (Fla. 1986) (case no. 64,221, opinion filed August 28, 1986) (11 FLW 445)

In Thompson v. State, 456 So.2d 444, 447 (Fla. 1984), this Court stated that "In the years since [Tedder was decided] we have not wavered from the Tedder test and have consistently applied it to the facts and circumstances of cases on review where the trial judge has overridden a jury recommendation of life imprisonment and imposed the death penalty." See also Rivers v. State, supra; Barclay v. State, supra; Huddleston v. State, supra; Amazon v. State, supra; Brookings v. State, supra, all of which were decided within the last two years, and subsequent to Thompson. In the present case, because it has nothing else to hang its hat on, the state is essentially asking this Court to overrule the Tedder principle sub silentio, by looking

only to what the trial court set forth in his order, and ignoring what the jury reasonably could have found. The latter inquiry, which has always been the critical question on review of a death sentence imposed pursuant to a trial judge's override of a jury life recommendation, the state dismisses as "speculation" (AB 3A,5,6,7,8). The state complains, "For this Court to speculatively flyspeck the record in search of any possible circumstance which could possibly have supported the recommendation of life completely obfuscates the statutory function of the sentencing judge"(AB 7). First of all, nobody is asking this Court or the trial court to flyspeck anything, and the only one doing any obfuscating is the state. Contrary to the state's disingenuous pose, this appeal does not involve any needle in a hyastack search for "any possible circumstance" to support the jury's life recommendation. The basis for the jury's life recommendation is patently obvious from the record, as counsel for the state themselves recognized when they thought it was to their advantage to do so. In its brief in the original appeal, through Attorney General Smith and Assistant Attorney General Marky, the state had no difficulty discerning the basis for the jury's life recommendation; in fact, they thought it was "rather clear". The state wrote:

> The only mitigating circumstances offered to the jury in this case was the non-enumerated mitigating circumstance that appellant was not the actual perpetrator of the homicide -- that Stevens was the actual murderer (TT 1009).
>
> In fact, counsel for this appellant told the jury that all the aggravating factors applied to Stevens (TT 1011). It is rather clear that the jury recommended life because they had no evidence that appellant participated in the actual homicide. The trial judge, however, did have such evidence (See: Issue VII) - and relied upon that evidence in imposing the sentence of death.

[Brief of Appellee, Case No. 57,708, p.29].

In this appeal on resentencing, we have the same jury life recommendation, and essentially the same evidentiary background, except that it has gotten stronger for the defense and weaker for the state. In other words, the trial evidence is the same as it was; some additional mitigating evidence has been introduced which tends to further demonstrate that the jury's life recommendation was reasonable, and Rufus Stevens' statements are gone. It was Stevens' statements which the state had relied upon in the earlier appeal to argue that the trial court, unlike the jury, had evidence that appellant "was a coparticipant in the homicide" [Brief of Appellee, case no. 57,708, p.29, see p.30,32]. However, this Court held that Stevens' statements were improperly considered by the trial court, in violation of appellant's constitutional right to confront and cross-examine adverse witnesses.[2] Engle v. State, 438 So.2d 803, 813-14 (1983).

In the present appeal, therefore, the state finds itself on the horns of a dilemma. Since it cannot demonstrate from the record that the jury's life recommendation was "unreasonable",[3] and since it can no longer raise the spectre of Rufus Stevens' statements, the state (through Attorney General Smith and Assistant Attorney General Millyer) now pretends that it can't figure out why in tarnation the jury recommended life. What was once "rather clear" to the state has now become "flyspecking", because without Rufus Stevens' statements to rely on, it is no longer expedient

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[2] In reaching this conclusion, this Court relied in part on Bruton v. United States, 391 U.S. 123 (1968). Bruton recognizes the extreme unreliability of accomplice testimony which cannot be tested by cross-examination, and the "recognized motivation [of an accomplice] to shift blame onto others". (391 U.S. at 136).

[3] The state has not disputed the evidence set forth and discussed in appellant's initial brief (p. 7-22,25,27-28,32-33,36-37). In fact, the state (consistent with its current position of relying on the trial court's sentencing order in a vacuum) does not bother addressing the evidence at all.

for the state to adhere to its former position.

The state does not dispute the facts set forth in appellant's brief at p. 7-22 (and discussed in relation to how they support the jury's life recommendation at p. 25,27-29,32-33,36-37); nor does the state make any attempt to show that those facts could not reasonably allow the jury to conclude that Stevens was the dominant actor in the crime and appellant a passive follower; that Stevens (in the company of the state's star witness Nathan Hamilton) had already formulated his plan to rob this particular Majik Market and abduct Mrs. Tolin before appellant ever came on the scene; that (after being turned down by Hamilton) Stevens enlisted appellant's assistance in the robbery without mentioning that he intended also to kidnap the clerk; that Stevens was the one who expressed concern about being identified, and who "went crazy" once they got the victim out of the store.

The jury could reasonably have reached these conclusions from the testimony of the state's own witnesses, and particularly that of Nathan Hamilton. The medical examiner was unable to tell whether the injuries to the victim were inflicted by one person or more than one person. Nathan Hamilton told Detective Parmenter that Stevens (his cousin) was the tougher and more dominant of the two, and that Stevens had done the killing with appellant's knife.

The state would have this Court ignore the evidence, the arguments of counsel, and the jury's questions (submitted during its almost six hours of guilt phase deliberations) which clearly reveal the jury's serious concern as to the degree of appellant's participation in the murder. The state does not wish to discuss the evidence or the evidentiary basis for the jury's recommendation, and it does not much approve of appellant's

discussing these matters either [see AB 8,n.1]. Instead, the state now assumes the posture that the basis for the jury's life recommendation is some kind of cosmic secret which can never be ascertained, so why bother trying? Not only does the state's argument fly in the face of more than a decade of well-reasoned and well-established Florida precedent (see the string cite on pages 2-3 of this brief), it also is blatantly inconsistent with the position taken by the state in the original appeal. "It is axiomatic that a party will not be allowed to maintain inconsistent positions in the course of litigation. McKee v. State, 450 So.2d 563, 564 (Fla. 3d DCA 1984); see also McPhee v. State, 254 So.2d 406, 409-10 (Fla. 1st DCA 1971); Irby v. State, 450 So.2d 1133, 1136 (Fla. 1st DCA 1984). This is a basic legal principle, from which the state is not exempt. See Steagald v. United States, 451 U.S. 204, 208-11 (1981); Finney v. State, 420 So.2d 639, 643-44 (Fla. 3d DCA 1982) (en banc) (Daniel Pearson, J., concurring); Vaprin v. State, 437 So.2d 177, 178 n.2 (Fla. 3d DCA 1983).

For the reasons discussed in appellant's initial brief, the jury's life recommendation was reasonable, and should be given effect. See Barclay v. State, 470 So.2d 691, 695 (Fla. 1985); Hawkins v. State, 436 So.2d 44 (Fla. 1983); Cf. Woods v. State, 490 So.2d 24, 27 (Fla. 1986). From the evidence before it, the jury could reasonably have concluded that Rufus Stevens, not appellant, was the planner and the dominant participant in the crime, and the active perpetrator of the homicide. Appellant's death sentence should be reversed, and the case remanded for imposition of a life sentence without possibility of parole for 25 years, in accordance with the jury's recommendation.

VI CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests that this Court reverse his death sentence and remand this case to the trial court with directions to impose a sentence of life imprisonment without eligibility for parole for twenty-five years, in accordance with the jury's recommendation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by hand delivery to Ms. Andrea Hillyer, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Appellee; and a copy has been mailed to appellant, Mr. Gregory Scott Engle, #069240, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, this 6 day of October, 1986.

Steven L Bolotin
STEVEN L. BOLOTIN